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Shook, Hardy and Bacon lawyers examine the impetuses for the latest proposed changes to the Federal Rules of Civil Procedure, highlight the most important discovery-related changes, discuss the intended effect of these amendments and provide practical advice about what civil litigants and their counsel can expect once the amendments take effect.

Amendments to Discovery Rules: How Will You Be Affected?

By Jesse E. Weisshaar and Mark W. Cowing

It is widely expected that an amended version of the Federal Rules of Civil Procedure (''Rules'') will go into effect on December 1, 2015.[1] The proposed amendments—reflecting more than five years of effort by Advisory Committee members—focus on discovery in general and discovery of electronically stored information (''ESI'') in particular.

Background

The proposed rule amendments are the federal judiciary's latest attempt to ''increase realistic access to the courts'' by reducing the costs and delays associated with civil litigation.[2]

It will come as no surprise to practitioners that the Advisory Committee's efforts to improve civil litigation focused on matters related to discovery. The costs and time spent on discovery-related aspects of litigation far outweigh all other pre-trial expenditures.[3] A significant

[1] The Advisory Committee on the Federal Rules of Civil Procedure (the ''Advisory Committee'') unanimously approved the proposed amendments in April 2014; the Committee on Rules of Practice and Procedure (the ''Standing Committee'') unanimously approved them in May 2014; the Judicial Conference of the United States (''Judicial Conference'') approved them in September 2014; and the Supreme Court of the United States approved them in late-April 2015. Absent any action by Congress to revise or reject the proposed amendments, they will take effect on December 1, 2015.

[2] Advisory Committee Memorandum to Standing Committee, June 2014 (''Advisory Committee Memo''), at 13.

[3] *See, e.g.*, Paula Hannaford-Agor & Nicole L. Waters, *Estimating the Cost of Civil Litigation*, at 7 (Jan. 2013), available at http://www.courtstatistics.org/~/media/microsites/files/csp/data%20pdf/csph_online2.ashx (second to trial, ''[d]iscovery is the second most time-intensive stage [of litigation], encompassing between one-fifth and one-quarter of total attorney hours''); *id*. at Figure 2 (showing discovery as the second most expensive stage of litigation (after trial) across all types of cases studied); Corina Gerety, Inst. for the Advancement of the Amer. Legal Sys., *Excess & Access: Consensus on the American Civil Justice Landscape*, at 11-12 (Feb. 2011), available at http://iaals.du.edu/images/wygwam/documents/publications/Excess_Access2011-2.pdf (reporting the results of surveys performed by the American Bar Association (''ABA''), American College of Trial Lawyers (''ACTL''), and National Employment Lawyers Association (''NELA''); ''Half of respondents reported that discovery consumes at least 70% of expenditures in cases

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portion—if not a majority—of those costs are often attributable to ESI.[4] And as the Advisory Committee recognized, ''the remarkable growth of ESI will continue and even accelerate'' in coming years.[5]

Costs. Some of the more obvious costs associated with discovery of ESI are tied to the resources and technology necessary for the preservation, collection, review and production of the massive amounts of data available as ESI.[6] Additionally, ''the explosion of ESI in recent years has presented new and unprecedented challenges''[7] that add to the costs and delays of civil litigation. These challenges were noted by many of the thousands of individuals, companies, non-profits, law firms and trade organizations that submitted comments and testified at public hearings on the proposed amendments to the Rules.[8]

Many noted one or more of the following challenges currently faced by civil litigants:

■ The disproportionate costs of discovery, especially in light of its extreme inefficiency.[9] For example:

♦ One commentator noted that the ratio of pages produced in discovery to pages used as exhibits at trial is estimated to be ''an astonishingly small .1 percent.''[10]

♦ More than one witness testified that their companies spend more on discovery than they pay to claimants in settlements and judgments.[11]

■ The potential for the high costs of discovery to determine the outcome of a case. In many cases, high discovery costs or the mere threat of major discovery requests can lead parties to settle, without regard to the merits of the case.[12]

■ The use of ''litigation by sanction.''[13] As explained by one commentator, discovery disputes can be used to:

> discolor a defendant in the judge's eyes and, when possible, generate sanctions. Monetary sanctions can help contingency fee attorneys lock in proceeds, regardless of a case's merits. Negative inferences can sway a jury in their favor, and the striking of a defendant's pleadings can win the case for them outright, without ever having to prove their case in court.[14]

Neither the Advisory Committee nor the Standing Committee voiced these specific concerns in their reports on the rule amendments. But at least one com-

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that are not tried; on average, respondents reported that two-thirds of expenditures are discovery related''); John H. Beisner, *Discovering A Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 549 (2010) (estimates suggest that discovery costs make up 50-90% of total litigation costs in a case).

[4] *See, e.g.*, Gerety, at 14; Beisner, at 564-566; Clayton L. Barker & Philip W. Goodin, *Discovery of Electronically Stored Information*, 64 J. MO. B. 12, 18 (2008) (discussing the ''several fundamental differences between paper and ESI'' that account for the greater discovery costs associated with the latter).

[5] Advisory Committee Memo, at 15.

[6] *See, e.g.*, Beisner, at 564-566.

[7] Advisory Committee Memo, at 15

[8] The proposed discovery-related amendments ''generated significant response,'' including more than 2,300 comments and testimony from more than 120 witnesses at three public hearings. Report of the Judicial Conference Committee on Rules of Practice and Procedure, Sep. 2014 (''Standing Committee Report''), at 14. All comments are available at http://www.regulations.gov/#!docketDetail;D=USC-RULES-CV-2013-0002. Hearing transcripts are available at http://www.uscourts.gov/file/9445/download?token=GRjY8M6s (Nov. 7, 2013); http://www.uscourts.gov/file/9446/download?token=MiUlresk (Jan. 9, 2014); and http://www.uscourts.gov/file/9447/download?token=y52aIMCA (Feb. 7, 2014).

[9] *See, e.g.*, Nov. 7, 2013 Public Hearing on Proposed Amendments to the Federal Rules of Civil Proc., Judicial Conf. Advisory Committee on Civil Rules Transcript (''Nov. 2013 Public Hearing''), Testimony of GlaxoSmithKline General Counsel Dan Troy, at 126; *Id.*, Testimony of Pfizer Assistant General Counsel Malini Moorthy, at 262-264; Jan. 9, 2014 Public Hearing on Proposed Amendments to the Federal Rules of Civil Proc., Judicial Conf. Advisory Committee on Civil Rules Transcript (''Jan. 2014 Public Hearing''), Testimony of Microsoft Deputy General Counsel David Howard, at 80; *Id.*, Testimony of Bayer Associate General Counsel Kasper Stoffelmayr, at 92; Feb. 7, 2014 Public Hearing on Proposed Amendments to the Federal Rules of Civil Proc., Judicial Conf. Advisory Committee on Civil Rules Transcript (''Feb. 2014 Public Hearing''), Testimony of Ice Miller Partner Mary Larimore, at 69, 71-72; *Id.*, Testimony of General Electric counsel Brad Bereson, at 111-112; *Id.*, Testimony of Eli Lilly and Company General Counsel Michael Harrington, at 121-122; *Id.*, Testimony of Ford Motor Company Assistant General Counsel Donald Lough, at 247; Comment from Nat'l Ass'n of Mfr., at 2-3 (submitted Feb. 14, 2014) (''NAM Comment'') (writing on behalf of more than 12,000 members); Comment from Volvo Construction Equipment, at 1 (submitted Feb. 14, 2014) (''Volvo Comment''); Comment from New York City Law Department, at 3 (submitted Feb 16, 2014) (''Cities Comment'') (on behalf of the cities of New York, Chicago and Houston and the International Municipal Lawyers Association); Comment from Bayer, at 2 (submitted Oct. 25, 2013) (''Bayer Comment''); Comment from Pharmaceutical Research and Manufacturers of America, at 3-4, 9 (submitted Feb. 13, 2014) (''PhRMA Comment''); Comment from Lawyers for Civil Justice, at 3, 17 (submitted Aug. 30, 2013) (''LCJ Comment''); Supplemental Comment from Lawyers for Civil Justice, at 2-3 (submitted Feb. 3, 2014) (cataloging testimony about specific examples of costly inefficiencies of discovery from public hearings on proposed amendments); Comment from U.S. Chamber Institute of Legal Reform, at 4, 8 (submitted Nov. 7, 2013) (''ILR Comment'').

[10] NAM Comment, at 2 (citing Lawyers for Civil Justice, *et al.*, *Statement On Litigation Cost Survey Of Major Companies*, presented to Judicial Conf. of the U.S.: Conf. on Rules of Prac. and Proc., App. 1 at 16 (2010)).

[11] Jan. 2014 Public Hearing, Testimony of Altec, Inc. General Counsel Rob Hunter, at 200-201; *Id.*, Testimony of Services Group of America General Counsel Steve Twist, at 245-246.

[12] *See, e.g.*, Comment from Shook, Hardy & Bacon, at 2 (submitted Oct. 29, 2013) (''Shook Comment''); Nov. 2013 Public Hearing, Testimony of General Counsel of the U.S. Chamber of Commerce Lily Fu Claffee, at 203; *Id.*, Testimony of Microsoft Deputy General Counsel David Howard, at 80-81 ; NAM Comment, at 2; Volvo Comment, at 1; Comment from the Ass'n for Corp. Counsel, at 2-3 (submitted Feb. 1, 2014) (''ACC Comment''); Bayer Comment, at 3; Comment from Intellectual Property Owners Ass'n, at 2 (submitted Feb. 14, 2014); PhRMA Comment, at 8-9, 15; LCJ Comment, at 2; ILR Comment, at 11-12.

[13] *See, e.g.*, Shook Comment, at 2; Nov. 2013 Public Hearing, Testimony of General Counsel of Emerson Electric Company Frank Steeves, at 304, 306; Jan. 2014 Public Hearing''), Testimony of Littler Mendelson National eDiscovery Counsel Paul Weiner, at 178, 182-183; Feb. 2014 Public Hearing, Testimony of General Electric counsel Brad Bereson, at 114-116; Cities Comment, at 1-2; ACC Comment, at 5; PhRMA Comment, at 3; LCJ Comment, at 3-4, 7; ILR Comment, at 7.

[14] Shook Comment, at 2.

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ment in the Advisory Committee's notes to the proposed Rules suggests that such concerns were acknowledged and influenced the proposals put forward. That note specifically cautions the court to use its powers under Rule 26 to '' 'prevent use of discovery to wage a war of attrition or as a device to coerce a party, whether financially weak or affluent.' ''[15]

Lack of Uniformity. One issue explicitly and repeatedly recognized by the Advisory Committee and the Standing Committee (and those offering comments and testimony[16]) is today's lack of a uniform standard by which to assess remedial measures and/or sanctions in the face of claims of spoliation. As described by the Standing Committee:

> ''The lack of uniformity—some circuits hold that adverse inference jury instructions can be imposed for the negligent loss of ESI and others require a showing of bad faith—has resulted in a tendency to over preserve ESI out of a fear of serious sanctions if actions are viewed in hindsight as negligent.''[17]

Thus, with the overarching goal of ''reducing the costs and delays in civil litigation''[18]—and with the undercurrent of discontent with the status quo from those under a duty to preserve and those on the receiving end of discovery gamesmanship—the Advisory Committee set its sights on a subset of Rules that provide the foundation for today's discovery practices.[19]

Proposed Amendments

The discovery-related proposed amendments are summarized in the following bullet points.

■ **Rule 1** is amended to emphasize that both the court *and the parties* have responsibilities to promote a ''just, speedy and inexpensive'' resolution to every case.

■ **Rule 16** is amended in several ways:

♦ To provide that if a scheduling order is not issued based upon the report of the parties' Rule 26(f) conference, then the court must hold a scheduling conference by means of direct simultaneous communication (i.e., not by written exchange).

♦ To reduce the time by which a scheduling order must be issued to the earlier of 90 days (from 120 days) after service of the complaint or 60 days (from 90 days) after any defendant has appeared.

♦ To explicitly permit the incorporation of three items into the scheduling order:

§ A preservation order;

§ An agreement under Federal Rule of Evidence 502[20] (''Rule 502'') regarding protection of privileged information; and

§ A requirement that an informal court hearing be had before the filing of any discovery motions.

■ **Rule 26** is amended in several ways:

♦ To clarify the appropriate scope of discovery—i.e., that information is discoverable if it is ''relevant to any party's claim or defense and proportional to the needs of the case.''[21]

♦ As part of the aforementioned clarification, to delete of the phrase ''reasonably calculated to lead to the discovery of admissible evidence.''

♦ To explicitly recognize that protective orders may allocate discovery costs.[22]

♦ To permit parties to serve Rule 34 requests (requests for production or inspection) before a Rule 26(f) conference has been held, as early as 22 days after service of the complaint.

♦ To add two items to be addressed in discovery plans: preservation issues and Rule 502 agreements.

■ **Rules 30, 31 and 33** are amended to ''reflect the recognition of proportionality'' in Rule 26.[23]

■ **Rule 34** is amended in several ways:

♦ To require that objections to Rule 34 requests be made with specificity.

♦ To require that the responding party state whether any responsive documents are being withheld based on objections.

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[15] Proposed Rule 26 Advisory Committee Note (Advisory Committee Memo, at 41) (quoting a 1983 Note after noting that ''Restoring proportionality as an express component of the scope of discovery warrants repetition of parts of the 1983 and 1993 Committee Notes that must not be lost from sight.'').

[16] *See, e.g.*, Nov. 2013 Public Hearing, Testimony of Exxon Mobile Corp. counsel Robert Levy, at 159-163, 166-168; Feb. 2014 Public Hearing, Testimony of Southern Company Chief Counsel Karl Moor, at 144-146; *Id*., Testimony of Pfizer Assistant General Counsel Thomas Kelly, at 1644; NAM Comment, at 4; Volvo, at 1; Cities Comment, at 2, 5-6; Bayer Comment, at 5; PhRMA Comment, at 3; LCJ Comment, at 3-4; ILR Comment, at 8; Shook Comment, at 4-5. *See generally* Comment from ARMA Int'l (submitted Feb. 14, 2014) (''ARMA Comment'') (providing perspective of records and information management professionals).

[17] Standing Committee Report, at 15. *See also* Advisory Committee Memo, at 14; Proposed Rule 37 Advisory Committee Note (Advisory Committee Memo, at 64-67).

[18] Standing Committee Report, at 13.

[19] The Advisory Committee also recommended amendments to Rules 4 and 84 (largely, to accomplish the abrogation of civil forms) and to Rule 55(c) (to correct an ambiguity that exists in the current rule regarding setting aside a default judgment). These proposed amendments garnered less controversy than the discovery-related proposed amendments. *Compare* Standing Committee Report, at 16 (''[m]ost of the comments submitted were supportive of the proposal'' to abrogate civil forms) and at 17 (''[t]hree comments were submitted, each of which favored the proposed amendment'' to Rule 55(c)) *with id*. at 14 (noting the ''significant response,'' in the form of comments and public testimony).

[20] Rule 502 provides, *inter alia*, that disclosure of a communication or information covered by the attorney-client privilege or work-product protection ''does not operate as a waiver in a federal or state proceeding if: (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error . . . .'' Federal Rule of Evidence 502(b). As the Advisory Committee noted, ''Rule 502 was designed in part to reduce the expense of producing ESI or other voluminous documents, and the parties and judges should consider its potential application early in the litigation.'' Advisory Committee Memo, at 12.

[21] Proposed Rule 26(b)(1).

[22] Some commentators have urged further reform that would replace the current rule with some form of a mandatory ''requester pays'' system. *See, e.g.*, Comment from Hon. Jon Kyl and Prof. E. Donald Elliott (submitted Feb. 7, 2014), at 3; Jan. 2014 Public Hearing, Testimony of Advisory Committee Chair Hon. David G. Campbell, at 50-51. A subcommittee of the Advisory Committee has been formed to study such a proposal. *Id*.

[23] Proposed Rules 30, 31, 33 Advisory Committee Notes (Advisory Committee Memo, at 48-50).

♦ To clarify that a responding party can state that it will produce documents or ESI in lieu of an inspection.

♦ To require that any such production be completed no later than the time for inspection stated in the request or a later reasonable time stated in the response.

■ **Rule 37** is amended to replace the existing Rule 37(e) with entirely new language designed to establish a uniform standard for dealing with the loss of ESI.

♦ Under the proposed amendments, the rule applies only if four initial elements are established:

1. The ESI should have been preserved in the anticipation or conduct of litigation;
2. A party failed to take reasonable steps to preserve the ESI;
3. As a result, the ESI was lost; and
4. The ESI could not be restored or replaced by additional discovery.[24]

♦ If those four elements are established, then

§ Under Rule 37(e)(1), ***curative measures*** are appropriate if the loss of the ESI caused ***prejudice*** to another party. The court is given broad discretion to impose appropriate measures, but they must be ''no greater than necessary to cure the prejudice.''

§ Under Rule 37(e)(2), certain proscribed ***sanctions*** are appropriate ''only upon finding that the party acted with the ***intent to deprive*** another party of the information's use in the litigation.''[25] (No prejudice is required.) In such a situation, the court may (a) presume the lost ESI was unfavorable, (b) ''instruct the jury that it may or must presume the information was unfavorable to the party''[26] or (c) dismiss the action or enter a default judgment.

§ The court retains discretion; the amended rule does not require a curative measure or sanction in any circumstance.

Intended Effects of Proposed Amendments

As discussed above, many members of the legal community recognize that discovery is, in some instances, used as a tool to delay, obfuscate and/or coerce. As such, discovery serves as an obvious target for amendments aimed at achieving quicker and less costly civil litigation.

Incorporated throughout the proposed amendments are three ''themes,'' the mechanisms by which the Advisory Committee seeks to accomplish this goal (and, thereby, restore discovery to its intended purpose[27]): (1) encouraging greater involvement by the court, (2) directing increased cooperation among the parties, and (3) reinforcing the import of proportionality.

Increased Involvement of the Courts. The proposed amendments to Rule 16 offer the most obvious indication of the Advisory Committee's effort to more directly involve the courts in the management of the discovery process.

The mandate of direct simultaneous communications between the parties and the court and the reduction of time by which a scheduling order must be issued are clear efforts to encourage earlier and more direct management by the courts.[28]

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[24] The Advisory Committee points out that ''[n]othing in the rule limits the court's powers under Rules 16 and 26 to authorize additional discovery. Orders under Rule 26(b)(2)(B) regarding discovery from sources that would ordinarily be considered inaccessible or under Rule 26(c)(1)(B) on allocation of expenses may be pertinent to solving such problems.'' Proposed Rule 37 Advisory Committee Note (Advisory Committee Memo, at 62).

[25] During a recent webcast relating to the proposed amendments, Judge Shira Scheindlin of the United States District Court for the Southern District of New York, suggested that the recent *Brookshire Brothers, Ltd. v. Aldridge* opinion out of the Supreme Court of Texas (438 S.W.3d 9 (Tex. 2014)) would serve as a good starting point for how to prove ''intent to deprive'' under the amended rule. The Sedona Conference, *Third Edition of West ''Electronic Discovery and Digital Evidence, Cases and Materials'' Published*, OnDemand Webinar Recording available at https://thesedonaconference.org/node/106850/notebook (Jul. 14, 2015).

[26] Such an instruction is often referred to as an ''adverse inference instruction.'' The proposed amendments to Rule 37(e) specifically foreclose the application of subdivision (e)(2) measures when there is no finding of an ''intent to deprive.'' *See, e.g.,* Proposed Rule 37 Advisory Committee Note (Advisory Committee Memo, at 64). But as relates to ''adverse inference instructions,'' lawyers and their clients would do well to keep in mind that appropriate subdivision (e)(1) measures might include ''permitting the parties to present evidence and argument to the jury regarding the loss of information, *or giving the jury instructions to assist in its evaluation of such evidence or argument*.'' Proposed Rule 37 Advisory Committee Note (Advisory Committee Memo, at 64) (emphasis added). Although it would seem to eliminate the distinction between a subdivision (e)(1) measure and a subdivision (e)(2) measure, at least one influential jurist has suggested that a subdivision (e)(1) jury instruction could include the type upheld in *Mali v. Federal Insurance*, 720 F. 3d 387, 391 (2d Cir. 2013):

> In this case, evidence has been received which the Defendant contends shows that a photograph exists or existed of the upstairs of what had been referred to as the barn house, but no such photograph has been produced. If you find that the Defendant has proven by a preponderance of the evidence, one, that this photograph exists or existed, two, that the photograph was in the exclusive possession of the Plaintiffs, and, three, that the non-production of the photograph has not been satisfactorily explained, then you may infer, though you are not required to do so, that if the photograph had been produced in court, it would have been unfavorable to the Plaintiffs. You may give any such inference, whatever force or effect as you think is appropriate under all the facts and circumstances.

The Sedona Conference, *Third Edition of West ''Electronic Discovery and Digital Evidence, Cases and Materials'' Published*, OnDemand Webinar Recording available at https://thesedonaconference.org/node/106850/notebook (Jul. 14, 2015) (comment by Judge Scheindlin). *See also Mali*, 720 F. 3d at 392-393 (distinguishing between an adverse inference instruction ''given as a sanction with respect to misconduct'' – such as spoliation of evidence – and an adverse inference instruction that ''is simply an explanation to the jury of its fact-finding powers.'').

[27] ''Discovery is not the purpose of litigation. It is merely a means to an end. If discovery does not promote the just, speedy and inexpensive determination of actions, then it is not fulfilling its purpose.'' Final Report on the Joint Project of the American College Of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System, at 7 (Mar 2009), available at http://iaals.du.edu/images/wygwam/documents/publications/ACTL-IAALS_Final_Report_rev_8-4-10.pdf.

[28] Advisory Committee Memo, at 12 (''This change [requiring direct simultaneous communications] is to encourage more direct management of discovery issues by the court

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But this goal is also manifested in the Advisory Committee's comments to proposed changes to Rules 26 and 37.

For example, Proposed Rule 26 Advisory Committee Note reiterates a 1983 Committee Note that ''[t]he rule contemplates greater judicial involvement in the discovery process . . .'' and states that ''[t]he present amendment again reflects the need for continuing and close judicial involvement in the cases that do not yield readily to the ideal of effective party management.''[29] Similarly, the Proposed Rule 37 Advisory Committee Note encourages parties to ''promptly seek[] judicial guidance'' if they cannot agree on preservation issues.[30]

While the proposed amendments in no way relieve the parties of any responsibility for discovery-related issues,[31] it is clear that the Advisory Committee believes that the courts must play a greater role in the management of discovery if civil litigation is to be reformed.

Cooperation Between the Parties. Among the responsibilities placed on parties and their counsel under the proposed amendments is greater cooperation with the opposing side.[32] And many of the proposed changes are aimed at facilitating such cooperation by forcing early, frequent and informed communications between the parties.

For example, permitting the early delivery of Rule 34 requests ''is designed to facilitate focused discussion during the Rule 26(f) conference.''[33]

Similarly, the change to Rule 26's proportionality language is intended to ''prompt a dialogue among the parties . . . concerning the amount of discovery reasonably needed to resolve the case.''[34] And the new requirements relating to objections to Rule 34 requests are meant to foster meaningful communication about what the responding party intends to produce (and not produce).[35]

The Advisory Committee clearly hopes that more frequent and meaningful communications between the parties will lead to greater cooperation that will, in turn, reduce costly and time-consuming disputes and motion practice.

Proportionality. Perhaps the most significant of all of the mechanisms employed by the Advisory Committee is the renewed emphasis on proportionality.

Proportionality has long been part of the Rules, but the amendments are intended to give the concept greater prominence to ensure that it is not overlooked by the courts[36] and that the parties incorporate the concept into their discovery practices.[37]

The most obvious means of accomplishing this goal are the proposed amendments to Rule 26's scope of discovery. But proportionality is not limited to Rule 26 considerations. The proposed amendments weave the concept of proportionality into all aspects and all stages of discovery, including, but not limited to:

- Decisions relating to preservation[38];
- Parties' discovery requests and responses[39];
- Resolution of discovery disputes[40]; and
- Efforts and assessments relating to lost ESI.[41]

Practical Effects of Proposed Amendments

The success or failure of these intended effects will depend largely on the willingness of all involved—parties and counsel on both sides of the ''v'' and the judges, magistrates and special masters charged with managing these matters —to work toward the end

earlier in the matter''; the reduction of time by which a scheduling order must be issued is intended ''to encourage early management of cases by judges.'').

[29] Proposed Rule 26 Advisory Committee Note (Advisory Committee Memo, at 41).

[30] Proposed Rule 37 Advisory Committee Note (Advisory Committee Memo, at 60).

[31] *See, e.g.*, Proposed Rule 1 Advisory Committee Note (Advisory Committee Memo, at 21) (''Rule 1 is amended to emphasize that just as the court should construe and administer these rules to secure the just, speedy, and inexpensive determination of every action, so the parties share the responsibility to employ the rules in the same way.'')

[32] Indeed, the Advisory Committee notes that effective advocacy *depends* on such cooperation between opposing counsel. Proposed Rule 1 Advisory Committee Note (Advisory Committee Memo, at 21-22).

[33] Proposed Rule 26 Advisory Committee Note (Advisory Committee Memo, at 45).

[34] Advisory Committee Memo, at 8.

[35] Proposed Rule 34 Advisory Committee Note (Advisory Committee Memo, at 54).

[36] Advisory Committee Memo, at 5 (public comments received to the proposed rule changes ''noted that the proportionality factors currently found in Rule 26(b)(2)(C)(iii) often are overlooked by courts and litigants''); *id*. at 7 (in surveys conducted by the ABA, ACTL, and NELA, ''between 61% and 76% of the respondents . . . agreed that judges do not enforce the rules' existing proportionality limitations on their own.'').

[37] Proposed Rule 26 Advisory Committee Note (Advisory Committee Memo, at 39) (''The present amendment restores the proportionality factors to their original place in defining the scope of discovery. This change reinforces the Rule 26(g) obligation of the parties to consider these factors in making discovery requests, responses, or objections.'')

[38] *See* Proposed Rule 37 Advisory Committee Note (Advisory Committee Memo, at 61) (recognizing proportionality as a ''factor in evaluating the reasonableness of preservation efforts'').

[39] *See* Proposed Rules 30, 31, 33 Advisory Committee Notes (Advisory Committee Memo, at 48-50) (explaining that the rules have been revised to ''reflect the recognition of proportionality'').

[40] *See* Proposed Rule 26 Advisory Committee Note (Advisory Committee Memo, at 39) (''The parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes'').

[41] *See* Proposed Rule 37 Advisory Committee Note (Advisory Committee Memo, at 62) (''Rule 37(e) directs that the initial focus should be on whether the lost information can be restored or replaced through additional discovery. . . . At the same time, it is important to emphasize that efforts to restore or replace lost information through discovery should be proportional to the apparent importance of the lost information to claims or defenses in the litigation.''); *id*. (Advisory Committee Memo, at 67) (''Finding an intent to deprive another party of the lost information's use in the litigation does not require a court to adopt the measures listed in subdivision (e)(2). *The remedy should fit the wrong*, and the severe measures authorized by this subdivision should not be used when the information lost was relatively unimportant or lesser measures such as those specified in subdivision (e)(1) would be sufficient to redress the loss.'') (emphasis added); Advisory Committee Memo, at 18-19 (same).

goal.[42] For as the Advisory Committee notes repeatedly reference, many of the proposed amendments do not change existing obligations. Rather, such amendments seek only to emphasize or clarify options and requirements under the existing Rules.

For example, Rule 1 is amended ''*to emphasize*'' that the goals of securing the just, speedy and inexpensive resolution of matters is a responsibility shared by the courts and the parties.[43]

Similarly, Rule 16's amendments explicitly identifying new items that can be incorporated into a scheduling order are intended to encourage practices that some federal courts are already undertaking.[44] And, Rule 26 is amended to restore prominence to proportionality, but the amendment ''does not change the existing responsibilities of the court and the parties.''[45]

Thus, in many ways, the Advisory Committee has merely provided the legal community with building blocks for reform. It is up to the members of the community to use the blocks to build the structure of change.

That said, the amended Rules will *require* at least some change to three important aspects of discovery: (1) speed, (2) specificity, and (3) assessing claims of lost ESI. Civil litigants and their counsel should be prepared to adjust their practices accordingly.

Be Prepared to Act Sooner. If amended Rule 16 becomes effective, the court will have 30 fewer days to issue a scheduling order.[46] This, in turn, means that the parties will have to hold their Rule 26(f) conference and serve their Rule 26(f) report to the court roughly a month earlier than required under the existing Rules.[47]

Whether a month's difference in time before a Rule 26(f) conference will impose a significant time crunch is likely to vary case by case and will often depend on the client's preparedness and the complexity of the case. But in any event, one of the proposed amendments to Rule 26 could add additional pressure.

Under the amended Rule 26, parties may issue requests for production of documents (''RFP'') as early as 22 days after service of the complaint.[48] Such an RFP will be considered ''served'' as of the Rule 26(f) conference,[49] which means a response would be due within 30 days of the conference.[50]

The following chart compares the effect of the amendments on the court's and parties' obligations—assuming no extensions or finding of good cause for delay— using a hypothetical in which the defendant was served with plaintiff's complaint on June 1, 2015.

	Under Existing Rules	**Under Proposed Rules**
Complaint served	**Monday, June 1**	**Monday, June 1**
RFP delivery[51]	As soon as Monday, September 7 (after 26(f) conference)	As soon as Monday, June 23
26(f) conference[52]	By Monday, September 7	By Monday, August 10

[42] *See, e.g.*, Mark A. Behrens & Ginny Knapp Dorell, *Changes to U.S. Court Rules Would Improve Civil Litigation*, LAWYER ISSUE, at 37 (Mar 2015) (''The 'black letter' in the new Rules will provide a modest help. If judges and litigants embrace the spirit of the changes, the changes could be even more dramatic.'').

Several individuals predict that at least the amendments intended to inject greater proportionality into discovery will result in increased motion practice for a period of time after the amended Rules become effective but that such amendments will eventually result in clearer boundaries such that civil litigants can expect an overall decrease in motion practice and collateral litigation over time. *See, e.g.*, Nov. 2013 Public Hearing, Testimony of Michael Rakower, Rakower Lupkin Partner, at 289-290; Feb. 2014 Public Hearing, Testimony of Ford Motor Company Assistant General Counsel Donald Lough, at 251-252.

But the limited data on the results of local rules amendments or pilot programs incorporating similar discovery-related reforms at the state or district court level suggest that efforts aimed at increased court involvement, greater cooperation between the parties and incorporation of proportionality have generally been successful. *See, e.g.*, Jan. 2014 Public Hearing, Testimony of Rich Benenson, Brownstein Hyatt Farber Schreck, at 318-320 (describing his experience with the Colorado Civil Access Pilot Project's application of a proportionality rule to all discovery; ''the process is working. . . . I'm currently lead counsel in a consumer protection class action case. And . . . my experience is that an express requirement to discuss proportionality facilitates'' more proactive communication; ''the case is proceeding more efficiently, our costs are down, and plaintiffs have gotten the information that they need''); 7th Cir. Electronic Discovery Pilot Program, Interim Report on Phase Three (May 2013), at 3-4 (reporting survey results after roughly two and a half years of participation in program that, *inter alia*, requires proportionality to be applied when formulating a discovery plan and requires greater and earlier judicial involvement in discovery; the majority of attorneys and judges reported no effect or an increase in fairness of e-discovery and in lawyers' meaningful attempts to resolve disputes without court intervention; 78% of judges reported increased cooperation among parties; 66% of judges reported that a party's ability to obtain relevant documents increased and none reported a decrease); Suffolk Superior Court Business Litigation Session Pilot Project, Final Report On The 2012 Attorney Survey (Dec. 2012), at 2 (attorney satisfaction survey with pilot program that included incorporation of proportionality requirement showed most respondents considered the pilot program to have worked better than other cases in terms of timeliness and cost-effectiveness of discovery, timeliness of case events, access to judge to resolve discovery issues, and cost-effectiveness of resolution).

[43] Proposed Rule 1 Advisory Committee Note (Advisory Committee Memo, at 21).

[44] *See* Advisory Committee Memo, at 12; Proposed Rule 16 Advisory Committee Note (Advisory Committee Memo, at 29).

[45] Proposed Rule 26 Advisory Committee Note (Advisory Committee Memo, at 39).

[46] *Compare* (Existing) Rule 16(b)(2) *with* Proposed Rule 16(b)(2). Under the proposed amendment, Rule 16 permits delay upon finding of good cause. Proposed Rule 16(b)(2). The discussion and hypothetical above assumes there is no good cause for delay.

[47] (Existing) Rule 26(f)(1) and (2).

[48] Proposed Rule 26(d)(2)(A).

[49] Proposed Rule 26(d)(2)(B).

[50] (Existing) Rule 34(b)(2)(A). *See also* Proposed Rule 34(b)(2)(A).

[51] *See* (Existing) Rule 26(d)(1); Proposed Rule 26(d)(2)(A).

[52] *See* (Existing) Rule 26(f)(1).

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	Under Existing Rules	Under Proposed Rules
Complaint served	**Monday, June 1**	**Monday, June 1**
Response to RFP[53]	By Wednesday, September 9	By Wednesday, September 9
26(f) conference report[54]	By Monday, September 21	By Monday, August 24
Scheduling order[55]	By Monday, September 28	By Monday, August 31

The delayed-service effect means that the client and its counsel would have more time to respond to an early-delivered RFP than they have to respond to the first RFP under the existing Rules. But don't be falsely assuaged by the time for response.

Because the early-delivered RFP is likely to drive much of the discussion at the Rule 26(f) conference,[56] at least some of the legwork that would go into preparing an RFP response will likely need to be undertaken in the much-smaller window of time between receipt of the early-delivered RFP and the Rule 26(f) conference.

Parties should be prepared to discuss the specific requests and whether they pose any particular concerns with respect to relevance, proportionality, burden and/or expense.

This will require that the responding party's counsel has an understanding of, at least, whether and where responsive data might exist, the party's preservation and retention policies affecting that data, and what would be required to collect, review and produce that data. If that information is not already within counsel's arsenal of knowledge, it must be attained in the relatively brief window of time before the Rule 26(f) conference.

Be Prepared to Be Specific. The proposed amendments to Rule 34 largely focus on specificity in a responding party's objections and answers to an RFP. If the amendments are adopted, a responding party must object ''with specificity,'' just as required when responding to an interrogatory under the existing Rules.[57]

But the specificity required of an objection to an RFP will come with the additional requirement to ''state whether any responsive material are being withheld on the basis of that objection.''[58] Thus, for example, a request might be overbroad, but if some part of the request is appropriate ''the objection should state the scope that is not overbroad.''[59]

The required specificity does not mandate ''a detailed description or log of all documents withheld'' but must be sufficient to ''alert other parties to the fact that documents have been withheld and thereby facilitate an informed discussion of the objection.''[60]

Returning to the example of an overbroad request, an objection that states the date and/or subject matter limits that will control the responding party's search for responsive and relevant materials ''qualifies as a statement that the materials have been 'withheld.' ''[61]

The amended Rule 34 will also require responding parties to be specific about when information responsive to RFPs will be produced. If the responding party will not be producing documents at the time specified in the request, the party must specifically identify ''another reasonable time'' by which production will be complete.[62] In circumstances in which production is made in waves or in stages, the responding party must ''specify the beginning and end dates of the production.''[63]

In addition to the specificity required under the proposed amendments to Rule 34, litigants can expect that specificity will be required if and when they assert objections to any discovery requests on grounds of proportionality. The Advisory Committee notes that the proportionality-related amendment to Rule 26 is not ''intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional.''[64] As foreseen by one of the witnesses at the public hearings on the proposed amendments, parties objecting on grounds of proportionality must be prepared to explain their position:

> They can't just say proportionality. They have got to be willing to get into a room and talk to their opponents about what matters in the case, who matters, what are the topics in dispute. If you want proportionality you have got to be willing to have that discussion.[65]

The proposed proportionality-related amendment to Rule 26 garnered more opposition during the public comment period than any other proposed amendment.[66] This opposition was based, at least in part, on the mistaken belief that the amendment shifts the ''burden of proof'' of the proportionality of discovery requests onto the requesting party.[67]

The misconception was corrected at the public hearings and in the Advisory Committee note to the proposed amended Rule 26.[68] And responding parties can safely bet that requesting parties will accordingly de-

[53] *See*(Existing) Rule 34(b)(2)(A); Proposed Rule 26(d)(2)(B); Proposed Rule 34(b)(2)(A).

[54] *See*(Existing) Rule 26(f)(2).

[55] *See*(Existing) Rule 16(b)(2); Proposed Rule 16(b)(2).

[56] The Advisory Committee members envision that the early RFP delivery will ''facilitate focused discussion during the Rule 26(f) conference.'' Proposed Rule 26 Advisory Committee Note (Advisory Committee Memo, at 45). And it is probably safe to assume that any party taking advantage of the early-delivered RFP will be expecting this ''focused discussion.''

[57] *See* Proposed Rule 34(b)(2)(B); (Existing) Rule 33(b)(4).

[58] Proposed Rule 34(b)(2)(C).

[59] Proposed Rule 34 Advisory Committee Note (Advisory Committee Memo, at 53).

[60] *Id*. (Advisory Committee Memo, at 54).

[61] *Id*.

[62] Proposed Rule 34(b)(2)(B).

[63] *Id*.

[64] Proposed Rule 26 Advisory Committee Note (Advisory Committee Memo, at 39).

[65] Feb. 2014 Public Hearing, Testimony of Gill Ketetas, at 252.

[66] *See generally*, Nov. 2013 Public Hearing; Jan. 2014 Public Hearing; Feb. 2014 Public Hearing.

[67] *See, e.g.*, Feb. 2014 Public Hearing, Testimony of Advisory Committee Member Parker C. Folse, at 34.

[68] *See, e.g., id*.; Proposed Rule 26 Advisory Committee Note (Advisory Committee Memo, at 40) (parties' responsibilities with respect to a disagreement regarding proportionality ''would remain as they have been since 1983.'').

mand – and courts will require – specificity for any proportionality-based objections.[69]

Be Prepared to Reassess Preservation Practices. Under case law applying the existing Rules, a party facing spoliation claims is held to different standards in different federal courts and, in some courts, risks severe sanctions upon a finding of mere negligence.[70] Additionally, courts have evaluated and imposed spoliation claims based on a duty to preserve running to ESI that is ''reasonably calculated to lead to the discovery of admissible evidence.''[71]

In light of these inconsistent standards and broadly interpreted scope of discovery, many companies today preserve most or all of the ESI they generate for fear of sanctions if the next court to address the issue concludes that the party's preservation efforts were unreasonable.[72]

Recognizing that such over-preservation of ESI can lead to increased costs and inefficiencies relating to discovery,[73] the Advisory Committee has proposed two amendments that will require some courts to modify their existing approaches to assessing claims of spoliated ESI. This, in turn, should provide a firmer basis for companies to make more reasonable preservation decisions.

The first such amendment is the deletion of the phrase ''reasonably calculated to lead to the discovery of admissible evidence'' from Rule 26's description of the scope of discovery. As noted by the Advisory Committee, this ''phrase has been used by some, incorrectly, to define the scope of discovery'' and has had the effect of swallowing other limitations on the appropriate scope.[74]

As amended, Rule 26 will correctly define the scope of discovery as information that is ''relevant to any party's claim or defense and proportional to the needs of the case.''[75]

The second such amendment—arguably the most overtly significant change from status quo that would result if the proposed rule amendments become effective— is the ''uniform standard'' in Rule 37(e) for addressing claims of lost ESI. If the amendments become effective, the new uniform standard will:

- Impose a ''reasonableness'' threshold: Sanctions or ''curative'' measures can be imposed only if the party failed to take reasonable steps to preserve ESI that should have been preserved in the anticipation or conduct of litigation; and

- Require a finding of prejudice or bad faith: The amended rule recognizes that a party's failure to preserve ESI does not, by itself, show bad faith and does not inherently prejudice the opposing party. ''Curative'' measures can be imposed only upon a finding of prejudice and only as sufficient to ''cure'' the prejudice. Proscribed sanctions can be imposed only upon a finding of intent to deprive another party of the lost ESI's use in the litigation.[76]

Notably, the Advisory Committee proposed the Rule 37(e) amendments for the explicit purpose of addressing the problem of over-preservation by parties in or anticipating litigation.[77]

The reasoning of the Advisory Committee with respect to amended Rule 37 (and the adoption of that reasoning by the Standing Committee, Judicial Conference and Supreme Court) provides a clear signal that over-preservation need not continue.

Companies should accept this implicit invitation to reassess their internal preservation policies, processes and practices. Adjustment of existing practices from the preservation of most or all ESI to preservation of ESI determined to be relevant, and the elimination of excessive, disproportionate efforts to preserve ESI will help companies to reduce their overall preservation and discovery spend and will help parties to focus on matters truly relevant to the litigation, thereby reducing the time to resolution of their disputes.

Claims of spoliation are necessarily addressed on a case-by-case, fact-intensive basis. Undoubtedly, case law will continue to shape the legal community's understanding of when the loss of ESI requires additional discovery efforts and/or justifies sanctions against a party.

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[69] *See, e.g.*, Duke Law Center for Judicial Studies, *Draft Guidelines and Suggested Practices for Implementing the 2015 Discovery Amendments to Achieve Proportionality*, at Guideline 2(F) (Aug. 2015), available at https://www.law.duke.edu/sites/default/files/centers/judicialstudies/guidelines_and_suggested_practicesthird_draft.pdf (suggesting that a party objecting on the basis of disproportionality will generally bear the burden of showing the nature and extent of the burden, expense, etc. Conversely, the requesting party will generally bear the burden of explaining the likely benefit of the proposed discovery.).

[70] *Compare Aramburu v. Boeing Co.*, 112 F.3d 1398, 1407 (10th Cir. 1997) (adverse inference instructions must be predicated on bad faith) *with Residential Funding Corp. v. DeGeorge Finan. Corp.*, 306 F.3d 99, 108 (2d Cir. 2002) (adverse inference instructions appropriate upon finding of negligence).

[71] *See, e.g.*, *Zublake v. UBS Warburg LLC*, 220 F.R.D. 212, 217 (S.D.N.Y.2003) (a litigant '' 'is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is *reasonably calculated to lead to the discovery of admissible evidence*, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request . . . .' '') (quoting *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 72 (S.D.N.Y.1991); *William T. Thompson Co. v. General Nutrition Corp.*, 593 F. Supp. 1443, 1455 (C.D. Cal. 1984)) (emphasis added).

[72] *See, e.g.*, Nov. 2013 Public Hearing, Testimony of GlaxoSmithKline General Counsel Dan Troy, at 126-127; *Id.*, Testimony of Exxon Mobile Corp. counsel Robert Levy, at 159-163; Jan. 2014 Public Hearing, Testimony of Boston Scientific General Counsel Timothy A. Pratt, at 27-28; *Id.*, Testimony of Microsoft Deputy General Counsel David Howard, at 81-82; Feb. 2014 Public Hearing, Testimony of Southern Company Chief Counsel Karl Moor, at 144-146; *Id.*, Testimony of Pfizer Assistant General Counsel Thomas Kelly, at 163-164; *Id.*, Testimony of Shell Oil Company managing counsel David Werner, at 188-189; Comment from Boston Scientific Corp. (submitted Feb. 14, 2014), at 2-3; Comment from Microsoft Corp. (submitted Feb. 15, 2014), at 7, 9.

[73] Advisory Committee Memo, at 17-18; Proposed Rule 37 Advisory Committee Note (Advisory Committee Memo, at 58).

[74] Proposed Rule 26 Advisory Committee Note (Advisory Committee Memo, at 44). *See also* Advisory Committee Memo, at 9-10 (explaining original intent of language and elaborating on the misplaced reliance on this phrase by courts and parties to define the scope of discovery).

[75] Proposed Rule 26(b)(1).

[76] *See* Proposed Rule 37(e). In making these amendments, the Advisory Committee explicitly rejected a negligence standard as too low a bar for the imposition of sanctions for loss of ESI, *see* Proposed Rule 37 Advisory Committee Note (Advisory Committee Memo, at 17-18), a view now implicitly endorsed by the Supreme Court. *See* Note 1, *supra*.

[77] Advisory Committee Memo, at 18.

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But the clarified scope of discovery under amended Rule 26 and the new spoliation standard provided by amended Rule 37(e) will—if they become effective—draw clearer lines around reasonable preservation efforts and sanctionable conduct.[78]

With the Rule 26 amendment, companies can be secure in making ESI preservation decisions based on what is relevant and proportional, omitting ESI that might be ''reasonably calculated to lead to the discovery of admissible evidence'' but that is not itself relevant. And under an amended Rule 37(e), companies will be protected from sanctions as long as they have taken ''reasonable steps'' to preserve ESI and do not delete ESI with the intent of preventing its use in litigation.

Conclusion

Before the year is out, the legal community is likely to be operating under a revised set of the Rules that shape discovery practices in civil litigation.[79]

Parties and their counsel will be called upon to work more cooperatively with their opponents, and courts will be asked to involve themselves in discovery matters earlier and more often. Given that most of the amendments geared toward these goals seek only to emphasize and clarify—rather than change—existing obligations, well-informed and well-intentioned parties, lawyers and courts might consider getting an early start on these objectives.

But all involved should be prepared to adjust their existing approaches to discovery to comply with the compulsory aspects of the Rules' amendments: (a) the reduction in time before parties and the courts begin addressing discovery-related matters; (b) the increased specificity required in objections and answers to discovery requests; and (c) the corrected (for some) and new standards for determining the scope of discoverable information and when sanctions for lost ESI can be imposed.

The amendments relating to reduced time to act and specificity will likely require only point-in-time adjustments to current practices. But the amendments relating to scope of discovery and assessment of spoliation claims afford an opportunity for a more systematic change—a reassessment of current preservation practices—that will likely require more time and effort to implement.

With the changes likely to take effect in a matter of days, parties and their counsel should consider beginning that undertaking now.

[78] Proposed Rule 37(e) ''forecloses reliance on inherent authority or state law to determine when certain measures should be used.'' But of course, the Rules are binding only in federal courts. State laws and state court rules may draw different lines. *Cf*. Proposed Rule 37 Advisory Committee Note (Advisory Committee Memo, at 58-59) (noting that the proposed amendments will ''not affect the validity of an independent tort claim for spoliation if state law applies in a case and authorizes the claim.''). But ''most states have adopted the [Rules] in whole or in part. And many would be informed by the action taken to amend'' them. Jan. 2014 Public Hearing, Testimony of Andy Cooke, Flaherty Sensabaugh Bonasso Member, at 323. *See also, e.g.*, Nov. 2013 Public Hearing, Testimony of John Pierce, on behalf of DRI, at 26 (predicting that there will ''be spillover into the state courts''); Jan. 2014 Public Hearing, Testimony of Services Group of America General Counsel Steve Twist, at 246 (same); *Id*., Testimony of Jill McIntyre, Jackson Kelly Member, at 260 (stating that West Virginia's supreme court ''has a great respect for the federal rules and intends to follow their interpretation, if not to adopt the rules wholesale''); ARMA Comment, at 5 (rejecting arguments that the effect of the Rules' amendments are ''illusory because [they] do not bind state courts'' because many states ''explicitly look to the federal rules and courts on issues of preservation and e-discovery''). Such an ''informing'' effect may be accelerated given that many states have adopted or are considering the adoption of civil discovery reform measures. *See* Jan. 2014 Public Hearing, Testimony of The Honorable Derek Pullan, Fourth District Court, Utah, at 209 (noting such efforts in Utah and 21 other states); Comment from Chair of the ACTL Task Force on Discovery and Civil Justice and the Executive Director of the Institute for the Advancement of the American Legal System (''IAALS'') (submitted Jan. 28, 2014), at 3-12 (describing reform efforts in states and federal courts around the country). *See also* IAALS, Rule One Initiative: Action on the Ground, available at: http://iaals.du.edu/initiatives/rule-one-initiative/implementation (mapping and describing efforts to increase ''access, efficiency and accountability,'' including several discovery-focused efforts, in courts across the country). *But see* The Sedona Conference, *Third Edition of West ''Electronic Discovery and Digital Evidence, Cases and Materials'' Published*, OnDemand Webinar Recording available at https://thesedonaconference.org/node/106850/notebook (Jul. 14, 2015) (during which Judge Scheindlin expressed her doubts that states would adopt the proposed amendment to Rule 37 without significant case law development).

[79] Indeed, efforts to prepare for the implementation of these proposed amendments have already begun. For example, since early-November 2015, the Duke Law Center for Judicial Studies and the American Bar Association Section of Litigation have been co-sponsoring educational programs about the Rule amendments for judges, their law clerks and practitioners. *See* https://law.duke.edu/judicialstudies/conferences/proportionality/.