


The Chief Umpire Is Changing the Strike Zone

By Ned Miltenberg, Esq. and Stuart Ollanik, Esq.

Judges are like umpires. Umpires don't make the rules, they apply them… and I will remember that it's my job to call balls and strikes, and not to pitch or bat.
- John G. Roberts, Jr.[1]

Introduction

Effective December 1, 2015, the Federal Rules of Civil Procedure have been amended in various ways, including key provisions governing the "scope and limits" of discovery in Fed.R.Civ.P. 26(b) and the provisions covering the loss or destruction of Electronically Stored Information ("ESI") in Fed.R.Civ.P. 37(e). Other, somewhat less significant changes have been made to Rules 26(c), 26(d), 26(f), 34(b), 4(m), 16(b), 55, 1, 84 and the Official Forms.

Lawyers who practice in **federal courts** need to be aware of these Rule changes and need to know that the corporate defendants (and the tort "reform" organizations they fund) that pushed for amending the Rules to their liking—and successfully lobbied Chief Justice Roberts to appoint corporate-minded judges to the Rules Advisory Committee that drafted the amendments—will be pushing their colleagues to construe the amended Rules in corporate-friendly ways.

Lawyers who practice in **state courts** need to be wary of these changes to the Federal Rules because those rules often are used as models for state court rules.

Lawyers who practice in **all courts** need to appreciate that the amendments to the text of the Rules are subject to interpretation and that trial lawyers can and should play a major role in determining how the amendments will be construed and what precedents will be set in the early courtroom skirmishes over their scope, limits and meaning.

The battle to *rewrite* the Rules is over. The battle to *interpret* the Rules is about to begin.

This article sketches some of the most important changes to the Federal Rules. **Section I, parts A, B and C** outline the significant amendments to Fed.R.Civ.P. 26(b). **Part D** suggests way in which trial lawyers can take advantage of these changes to obtain discovery and advance the interests of their clients. **Section II** appraises the wholesale changes to 37(e). Lastly, Section III briefly covers the comparatively modest modifications made to Fed.R.Civ.P. 6(c), 26(d), 26(f), 34(b), 4(m), 16(b), 55, 1, 84 and the Official Forms.

This article is not exhaustive and it does not identify every aspect, good and bad of every amendment. Nor does this article purport to provide all of the arguments you will need to ensure that your clients' interests—and the interests of future clients—are not undermined by willful misreadings of the Rules. Although this article suggests some possible ways of navigating around the most troublesome changes, in order to truly safeguard your clients' interests you will need to review not only the Rules themselves but also both the Advisory Committee Notes and the Minutes of the Committee's deliberations, especially with an eye to the tort "reform" amendments that were proposed and rejected. Finally, readers should feel free to contact the authors for help—and, even better, to offer suggestions—on how to brief and argue these amendments. We hope to summarize the suggestions offered and the lessons learned in a future article.

Chief Justice Roberts appointed the federal judges who sat on the Advisory Committee that amended the Rules and effectively changed the strike zone. He also presides over the Court that endorsed the amendments the Advisory Committee proposed. That Court obviously will be the ultimate arbiter

of the strike zone. Nevertheless, trial lawyers still have a great deal to say on how the game is played and who is ultimately victorious. As Roberts conceded a decade ago, whatever his desires to control results, "it's my job to call balls and strikes, and not to pitch or bat."[2]

I. Amendments to Fed.R.Civ.P. 26(b)

Nearly 70 years ago, the Supreme Court unanimously recognized the principle that underlies all discovery: "[m]utual knowledge of ***all*** the relevant facts by both parties is essential to proper litigation."[3] That was a different time. And that was a very different Court. As NYU Law Professor Arthur R. Miller, the long-time (but no longer) Reporter of the Federal Rules of Civil Procedure has explained, although "[e]ffective discovery" traditionally has been and still "is the lifeblood for proving one's case or defense," John Roberts' Supreme Court, and the Advisory Committee of the Federal Rules that is dominated by Roberts' appointees,[4] has demonstrated a desire to squeeze "the jugular of the discovery regime as we have known it."[5]

There is a danger that amended Rule 26(b), if misapplied, could constrict the "jugular" of discovery in four ways: by substantially redefining and greatly narrowing the overall "scope" of discovery that had been set out in Rule 26(b)(1) and then by shutting all three of the longstanding pro-discovery "safety valves" (or, as corporate defendants castigate them, "loopholes") to the earlier regime.

In a nutshell, Rule 26(b) has been amended in seven ways. Thus, the amended Rule:

1) Elevates the "proportionality" factor by moving that consideration from a sub-sub-sub-sub-section —Rule 26(b)(2)(C)(iii)—into the text of Rule 26(b)(1), where it is now an essential part of the redefined "scope and limits" of discovery;

2) Alters the proportionality calculus by enumerating, for the first time, six factors that parties and courts should consider;

3) Deletes, as unnecessary, the long-standing provision that had allowed a court to order "subject matter" discovery for "good cause";

4) Likewise deletes, as superfluous, the language explicitly stating that the scope of discovery includes information about the existence, and details about the "custody" and "location" of relevant information;.

5) Alters the language that had recognized the relationship between discoverable information and admissible evidence. Thus, the amended Rule deletes the time-honored formulation that "[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence";

6) Alters Rule 26(b)(2) to reflect the relocation of the "proportionality" consideration from Rule 26(b)(2)(C)(iii) to Rule 26(b)(1); and

7) Alters Rule 26(c) to explicitly reference "allocation of expenses," i.e., cost-sharing, as a permissible protection against "undue burden or expense."

A. Discovery Now Must Be "Proportional" as well as "Relevant"

Amended Rule 26(b)(1) replaces the fundamental and solitary principle "that the scope of discovery embraces anything that is relevant to a claim or defense … with dual requirements that the material sought be both relevant **and** proportionate according to [six] criteria that are both highly subjective and fact dependent."[6] Thus, Rule 26(b)(1), as amended, provides:

> (b) Discovery Scope and Limits.
>
> (1) Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is [A] relevant to any party's claim or defense and [B] proportional to the needs of the case, considering [1] the importance of the issues at stake in the action, [2] the amount in controversy, [3] the parties' relative access to relevant information, [4] the parties' resources, [5] the importance of the discovery in resolving the issues, and [6] whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable .

The amended Rule invites several questions, the answers to which often engender more problems than they solve, and all of which are likely to spawn satellite litigation and thus add to the burdens and costs of discovery. Ironically, these are the twin perils of discovery the amendments ostensibly are intended to reduce.

The amended Rule does not explain who has the burden of proof regarding "proportionality." While the proposed amendments remained under consideration, Professor Miller expressed concern that the burden would fall on the requesting party.[8] Nearly two hundred other scholars who opposed the amendment fear that Miller might be right, writing that "[t]here is … a danger" that the amended rule will:

> be misinterpreted to place the burden on the discovering party,

> in every instance, to satisfy each item on the (b)(2)(C)(iii) laundry list in order to demonstrate discoverability. This would improperly shift the responsibility to show burdensomeness from the party resisting discovery to the party seeking discovery ….[9]

If these scholars' fears are borne out—and producing parties are sure to argue that they should be—then if a producing party objects that discovery requests are not "proportional to the needs of the case," the requesting party will likely need to show that the request is either generally proportional to "needs of the case," and/or particularly proportional in light of the six undefined and vague factors, i.e., "considering":

1) "the importance of the issues at stake in the action";
2) "the amount in controversy";
3) "the parties' relative access to relevant information";
4) "the parties' resources";
5) "the importance of the discovery in resolving the issues"; and
6) "whether the burden or expense of the proposed discovery outweighs its likely benefit."

Another highly regarded scholar, Alan B. Morrison (a Professor and Associate Dean at George Washington University Law School and the founder and longtime head of the Public Citizen Litigation Group), worries that a requesting party may not only have the burden of proof if a producing party objects to a discovery request on proportionality grounds, but also that requesting parties may have an affirmative obligation to "factor proportionality into their requests."[10]

Because these six new criteria are highly subjective, proving that any or all of them are met could easily require highly fact-intensive (and expensive) briefing, at a time when the requesting party is unlikely to have—pre-discovery—the very facts needed to prove the need for discovery. This is the litigation equivalent of Catch-22.

It also is hard to imagine how a busy trial court will be able to determine—pre-discovery—whether a specific discovery request (or a bevy of requests) is truly proportional to the overriding "needs of the case." As one highly regarded jurist, Judge Shira A. Scheindlin of the U.S. District Court for the Southern District of New York lamented, addressing these six factors regarding every discovery request not only will be "burdensome" on the parties but equally arduous for the court. For example: "[t]he requesting party will say the case is worth one million dollars and the producing party will say it is worth [only] ten thousand dollars. How will a court fairly decide the amount in controversy at the very outset of the case?"[11]

Similarly, if the producing party: (A) cites the sixth, cost/benefit ground in resisting a document request, i.e., on the ground that "the burden or expense of the proposed discovery outweighs its likely benefit"; (B) proffers the corporate document custodian who swears that the likely costs will be large; and then (C) argues (or proffers an expert who speculates) that the likely benefit will be only no more than a tenth (or a thousandth) of the costs, it is unlikely that the requesting party will be able overcome that objection merely by asserting the producing party is exaggerating. Instead, the requesting party may need both to introduce its own experts to challenge the methodology, reasoning and conclusion of the producing party's expert and to proffer other experts to establish that there are more efficient and less expensive ways to locate and produce responsive documents. This scheme will usher the parties and the court into a house of horrors.

> Does the court then appoint an expert to determine the true burden or expense of responding to the request? Does the court investigate the sources on which the records reside and perhaps arbitrarily decide the number of custodians whose records must be collected, retrieved, and reviewed? And then the court must balance the alleged burden and expense against the potential benefit. How, exactly, can a court assess the benefit of materials that have not been identified—except in the most general way—at the very outset of the case?[12]
>
> What a nightmare for the court![13]

This scheme also will encourage expensive satellite litigation, which will bog down the discovery process and increase costs and delays.[14] Even worse will be the effect on the truth-finding function of litigation. Especially in cases in which an individual is suing an institution like a large corporation company or a government agency, the discovery rules developed in recognition that the institutional defendant starts the case with sole custody of the key relevant information, and with a powerful incentive to keep that information from getting into its opponents' hands. Perversely, the amended Rule effectively requires a requesting party to run through the proportionality hoops while the institutional defendant still has sole control of the information sought. This makes the process subject to partisan manipulation, and makes it very difficult for the requesting party to challenge claims of "undue burden," "outrageous expense," and "utter lack of relevance," much less prove the opposite.

Along the same lines, it is difficult to conceive how parties are supposed to address how and to what extent a discovery request is (or is not) proportional (in monetary terms) not only in comparison to the second, explicitly monetary factor "the amount in controversy," but also in relation to the first and fifth factors, i.e., "the importance of the issues at stake in the action" and "the importance of the discovery in resolving the issues." This is especially so when some or all of the "issues" involved in the case are non-monetary in nature.

As Professor Morrison wondered:

> Is the focus supposed to be on "issues" (whatever that may mean and however deeply the court is supposed to delve into the case to determine them) or on the overall claims in the case? If the former, what if some issues are routine, but there is a liability or damages issue of great importance generally, but not to the discovery dispute? If the focus is on the claim, is a constitutional claim always more important than a statutory or common law claim? What if there are several claims in the case and the discovery sought bears on only some of them?[15]

These questions raise another one. What standards should parties and the court use in engaging in a cost-benefit calculus involving incommensurable factors, i.e., between monetary costs and non-monetary values? For example, how are litigants and courts supposed to weigh the "expense of the proposed discovery" against the benefit of all litigants having access to all the relevant information needed to prove a case involving such fundamental and "invaluable," but non-monetary rights as the Seventh Amendment rights to trial by jury, the Fifth Amendment rights to Due Process and Equal Protection and the First Amendment rights of Freedom of Speech and of the Press?

Lest there be any doubt about the overall anti-discovery risk presented by amended Rule 26(b), the Advisory Committee's explanatory Notes make clear that Rule 26(b)(1)'s "new sentence is intended to encourage judges to be more aggressive in identifying and discouraging discovery overuse" and to overcome their supposed "reluctan[ce] to limit the use of the discovery …." As recent events make clear, though, this speculative mania about discovery "abuse" and "overuse" is misguided, particularly in light of the demonstrated effects of the discovery evasion, which has plagued the nation for decades. Consider the example of the General Motors ignition switch defects found in hundreds of thousands of cars that have killed or injured hundreds of people. Consider, too, the Takata exploding airbag defect that is causing the largest recall in U.S. history. Facts hidden from victims, and early settlements coupled with court secrecy, kept these defects hidden from government regulators and the public—and allowed dangerous products to remain on the streets—for years after the manufacturers knew about them.[16]

B. Closing Three "Safety Valves" Regarding Relevance

In addition to inserting the proportionality standard into Rule 26(b), the amended Rule eliminates three provisions that had been key features of the prior incarnation of Rule 26, three provisions that had facilitated the discovery (and had prevented the suppression) of relevant information. " Professor Miller extolled them as "safety valves"; corporate defendants condemned them as "loopholes." All three are now gone from the text of the Rule. As discussed below, however, courts should recognize that the essence of these "safety valves" still remain part of the law of discovery.

1. ***Discovery "relevant to the subject matter" of the litigation.*** Previously, Rule 26(b)(1) provided, **"**For good cause, the court may order discovery of any material "relevant to the subject matter involved in the action." There was no empirical evidence the "subject matter" exception was being overused or abused.[17] Moreover, there were already protections in place, pre-amendment, to assure this "relevant to the subject matter" rule did not lead to overbroad discovery. Thus, even if a party established "good cause," such discovery was subject to two companion restrictions: Rule 26(b)(2)(C)'s "limitations on [the] frequency and [e]xtent" of discovery and protective orders under Rule 26(c). Nevertheless, the amendment strikes this language.

2. ***Discovery regarding the "existence," "custody," and "location" of relevant evidence, among other things***. The amendment to Rule 26(b)(1) eliminates the language specifying that discovery can be sought to obtain information "regarding ... the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter."

3. ***Discovery of information "*****reasonably calculated to lead to the discovery of admissible evidence.*****"*** The amendment to Rule 26(b)(1) eliminates a sentence that had guided courts for decades: "Relevant information need not be admissible at the trial if the discovery appears **reasonably calculated** to lead to the discovery of admissible evidence."[18] As discussed below, however, although this "reasonably calculated" safety valve has lost both its historic formulation and its prominent place, the Advisory Committee's Notes stress that information still need not be admissible to be discoverable.

C. Construing the Amendments to Rule 26(b): the Battle Starts Now

As these Rule amendments go into effect, the battle begins to define what they mean. No doubt, institutional defendants will routinely object to discovery based on disproportionality arguments and the other changes to Rule 26(b) language, and will seek early orders interpreting these provisions in a way that helps them avoid disclosing evidence unfavorable to them. Lawyers representing individuals need to be ready to defend their clients' right of access to all the relevant information—a right on which the entire truth-finding mission of the civil justice system depends. While this article has thus far focused on the dangers presented by the rules, there is helpful language in both the text of Rules and the Committee Notes that these amendments reflect a change of emphasis only, that they were not intended and should not be interpreted as a "sea change" in discovery relevance, and that they should not be used to keep relevant evidence from seeing the light of day.

Taken as a whole, the Rule changes and their official commentary, i.e., the accompanying Advisory Committee Notes, show that the basic tenets of discovery relevance remain secure.

For example, the Advisory Committee's decision to insert "proportionality" into Rule 26(b)(1) largely just rearranges the furniture. As the Advisory Committee Notes explain, the proportionality requirement added to Rule 26(b)(1) previously had been part of Rule 26(b)(2)(C)(iii), which, in turn, was informed by Rule 26(g). The Committee did not add "proportionality," just relocated it. In fact, the Notes emphasize, "[t]he present amendment [merely] restores the proportionality factors to their original place in defining the scope of discovery" and therefore simply "reinforces the Rule 26(g) obligation of the parties to consider these factors in making discovery requests, responses, or objections." As such, "[r]estoring the proportionality calculation to Rule 26(b)(1) **does not change the existing responsibilities** of the court and the parties to consider proportionality, and the **change does not place on the party seeking discovery the burden** of addressing all proportionality considerations."[19]

The Advisory Committee further cautioned that "the **change [is not] intended to permit** the opposing party to refuse discovery simply by making a **boilerplate objection** that it is not proportional."[20] In addition, those Notes make clear that courts should recognize the frequent existence of "information asymmetry," and take into account the facts that "[t]he parties may begin discovery without a full appreciation of the factors that bear on proportionality" and that "[a] party claiming undue burden or expense ordinarily has far better information—perhaps the only information—with respect to that part of the determination."[21] Thus the Notes officially recognize this

concern, directing courts to take heed of the fact that "[o]ne party—often an individual plaintiff—may have very little discoverable information. The other party may have vast amounts of information, including information that can be readily retrieve and information that is more difficult to retrieve. In practice these circumstances often mean that the burden of responding to discovery lies heavier on the party who has more information, and properly so."[22]

Along the same lines, the Advisory Committee stressed that courts should evaluate the six proportionality "considerations" holistically and not in isolation. For example:

> It also is important to repeat the caution that the monetary stakes are only one factor, to be balanced against other factors. The 1983 Committee Note recognized "the significance of the substantive issues, as measured in philosophic, social, or institutional terms. Thus the rule recognizes that many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved." Many other substantive areas also may involve litigation that seeks relatively small amounts of money, or no money at all, but that seeks to vindicate vitally important personal or public values.[23]

The Advisory Committee similarly cautioned that

> The burden or expense of proposed discovery should be determined in a realistic way. This includes the burden or expense of producing electronically stored information. Computer-based methods of searching such information continue to develop, particularly for cases involving large volumes of electronically stored information. Courts and parties should be willing to consider the opportunities for reducing the burden or expense of discovery as reliable means of searching electronically stored information become available.[24]

Finally, the Advisory Committee Notes belie any argument that elimination of the "safety valve" language was meant to restrict discovery in any significant way. With respect to the language about discovery of information that may concern the existence and whereabouts of evidence, the committee is crystal clear that this **remains** within the proper scope of discovery, "Discovery of such matters is so deeply entrenched in practice that it is no longer necessary to clutter the long text of Rule 26 with these examples," that is, with 27 superfluous words.[25] The Advisory Committee's Note also states that, in any event, "[t]he discovery identified in these examples should still be permitted under the revised rule when relevant and proportional to the needs of the case."[26] With respect to the language that permits discovery of documents inadmissible themselves but "reasonably calculated" to lead to the discovery of relevant evidence, the amendment again simply shortens the description without curtailing the content. It replaces the longer phrase with a statement, "Information within this scope of discovery need not be admissible in evidence to be discoverable."

D. Turning a Sow's Ear into a Silk Purse: How Plaintiffs Can Take Advantage of the Amendments to Rule 26(b)

The Advisory Committee made clear that the amendments to Rule 26 are intended to make discovery more efficient and cost-effective for all parties, not abolish it. Thus, the Committee Notes emphasize that amending the text of Rule 26(b) regarding "proportionality" was not designed to suppress discovery but merely to "**restore**[] the proportionality factors to their original place in defining the scope of discovery" and simply to "**reinforce**[] the Rule 26(g) obligation of the parties to consider the[] [proportionality] factors in making discovery requests, responses, or objections."[27]

Plaintiffs' lawyers can and should embrace these changes, not shrink in fear from them. In fact, relocating proportionality from Rule 26(b)(2)(C)(iii) to Rule 26(b)(1) provides a plaintiff with a wonderful opportunity, at the Rule 26(f) discovery conference or a similarly early stage in the case (e.g., at "scheduling [or] pretrial conferences"[28]), to explain to the court the fundamental importance of the case and the issues involved in it.

In this light, each of the six factors provides a chance for the plaintiff to explain why his or her discovery requests satisfy the proportionality criteria. Thus, the plaintiff should demonstrate how the requests not only are "relevant " but also reasonable and "proportional" to the case. For example, the plaintiff can explain why the requests are proportional in view of the enormous damage the plaintiff has suffered and the importance of the issues he or she raises for other plaintiffs who may have been subject to the same mistreatment or dangerous product, i.e., why the discovery requests satisfy the first and second factors—"the importance of the issues at stake in the action" and, to a lesser extent, "the amount in controversy."

The plaintiff similarly should explicate how the discovery requests are comparatively "proportional" in terms of both the gross "difference in resources" between the plaintiff and the defendant (i.e., Factor 4) and the

tremendous disparity between the plaintiff's and the defendant's "access to relevant information" (Factor 3).

Lastly, the plaintiff should explain why the information reasonably may be useful in proving the full measure of defendant's culpability and thus how the requests sufficiently satisfy both Factor 5 and (i.e., "the importance of the discovery in resolving the issues") and Factor 6 ("the burden or expense of the proposed discovery outweighs its likely benefit).

The plaintiff should not ignore—and should not allow the court to disregard—the favorable language in the Advisory Committee Notes.

The parties may begin discovery without a full appreciation of the factors that bear on proportionality. A party requesting discovery, for example, may have little information about the burden or expense of responding. A party requested to provide discovery may have little information about the importance of the discovery in resolving the issues as understood by the requesting party. Many of these uncertainties should be addressed and reduced in the parties' Rule 26(f) conference and in scheduling and pretrial conferences with the court. But if the parties continue to disagree, the discovery dispute could be brought before the court and the parties' responsibilities would remain as they have been since 1983. A party claiming undue burden or expense ordinarily has far better information—perhaps the only information—with respect to that part of the determination. A party claiming that a request is important to resolve the issues should be able to explain the ways in which the underlying information bears on the issues as that party understands them. The court's responsibility, using all the information provided by the parties, is to consider these and all the other factors in reaching a case-specific determination of the appropriate scope of discovery.

The direction to consider the parties' relative access to relevant information adds new text to provide explicit focus on considerations already implicit in present Rule 26(b)(2)(C)(iii). Some cases involve what often is called "information asymmetry." One party—often an individual plaintiff—may have very little discoverable information. The other party may have vast amounts of information, including information that can be readily retrieved and information that is more difficult to retrieve. In practice these circumstances often mean that the burden of responding to discovery lies heavier on the party who has more information, and properly so.

* * *

It also is important to repeat the caution that the monetary stakes are only one factor, to be balanced against other factors. The 1983 Committee Note recognized "the significance of the substantive issues, as measured in philosophic, social, or institutional terms. Thus the rule recognizes that many cases in public policy spheres, such as employment practices, free speech, and other

> matters, may have importance far beyond the monetary amount involved." Many other substantive areas also may involve litigation that seeks relatively small amounts of money, or no money at all, but that seeks to vindicate vitally important personal or public values.[29]

In addition, because all discovery must cross the proportionality threshold, when a plaintiff argues the relevance of his or her issues to other cases and gets a favorable ruling on the discovery request, he or she also gets a court ruling that can be used when the case is finally resolved to resist defendant's efforts to seal the material obtained in discovery to protect itself from similar litigation by other injured parties. By adding importance of the issues in the case as a factor to be considered in approving discovery, Congress has essentially endorsed the idea that discovery in one case should be readily available for use in other similar cases involving the same defendant.

To take full advantage of the new provisions of Rule 26, plaintiff's counsel may choose to lay out their case for discovery as part of a preamble to discovery requests. This will put the defendant on notice that it may want to avoid objecting based on proportionality considerations. It also will build into the basic discovery documents that the court will review, the fundamental arguments that buttress the credibility not only of the discovery request, but also of the entire case.

II. Amendments to F.R.C.P. 37(e)

Rule 37(e) has been completely rewritten to place limits on spoliation sanctions for failure to preserve Electronically Stored Information ("ESI"), and makes any sanction much more difficult to obtain.

In a nutshell, amended Rule 37(e) makes four significant changes.

1) A court must first find a party breached a pre-existing duty to preserve ESI;

2) No "curative measure" or "severe sanctions" are available or required if the ESI can be restored or replaced through further discovery;

3) A court may order some modest, non-punitive "curative measures" if the ESI cannot be restored or replaced and if the court further finds the requesting party has been prejudiced by the loss; and

4) A court may order more "severe sanctions"—e.g., an adverse inference instruction, dismissal or default—only if the court finds that the party that failed to preserve ESI did so "with the intent to deprive another party of the information's use in the litigation."

Rule 37(e) has been completely rewritten, as shown below. It now provides:

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

Amended Rule 37(e) focuses on the unintended loss or intentional destruction of electronically stored information ("ESI"). It replaces the 2006 version of the same rule. It authorizes and specifies measures a court may employ if ESI that a party should have preserved is lost or destroyed, and specifies the findings a court must make to justify "curative measures" (for negligent or grossly negligent losses) or "severe sanctions" (for intentional destruction).[30] Although amended Rule 37(e) bars a court from relying on state law or the courts' inherent powers to determine if it should impose such "measures" or "sanctions," and which ones, it does not bar "an independent tort claim for spoliation" so long as "state law applies in a case and authorizes the claim."[31]

The amended Rule applies only if the lost or destroyed information should have been preserved in the anticipation or conduct of litigation and the party failed to take "reasonable steps" to preserve it; it does not apply if ESI evaporates before a duty to preserve arises.[32] Like its predecessor, amended Rule 37(e) is largely based on the common-law duty to preserve relevant information when litigation is reasonably foreseeable; it does not create a new duty to preserve ESI and is inapplicable to ESI that is lost/destroyed before a duty to preserve arises.[33] The duty to preserve also can arise from (or be triggered by) statutes, administrative regulations, the party's own ESI preservation standards and protocols,

and court preservation orders in the instant (or another) case (such as preservation orders issued under Rules 16(b)(3)(B)(iii) or 26(f)(3)(C)).[34]

As such, the amended Rule effectively requires courts to decide if and when a duty to preserve arose. "Courts should consider the extent to which a party was on notice that litigation was likely and that the information would be relevant."[35] A variety of events may alert a party to the prospect of litigation. For instance, every manufacturer of a mass-produced product, from an automobile to a pharmaceutical device, can anticipate product liability litigation, so design, testing and risk analysis documents always should be preserved.

As the Advisory Committee Notes explain, "[a]s under the current rule, the routine, good-faith operation of an electronic information system would be a relevant factor for the court to consider in evaluating whether a party failed to take reasonable steps to preserve lost information." Importantly, what is routine may not be "reasonable," exactly because "the prospect of litigation may call for [additional] steps to preserve information by intervening in that routine operation."[36]

The standard varies not only with the circumstances of the case but also with the status, experience and sophistication of the litigant. Thus, the Advisory Committee admonishes courts to "be sensitive to the party's sophistication with regard to litigation in evaluating preservation efforts; some litigants, particularly individual litigants, may be less familiar with preservation obligations than others who have considerable experience in litigation."[37] Because the amended Rule calls only for "reasonable" efforts at preservation, "it is inapplicable when the loss of information occurs despite the party's reasonable steps to preserve," such as due to natural disasters, the failure of a "cloud" service, or when "a malign software attack may disrupt a storage system, and so on."[38] Significantly, however, courts need not credit such dog-ate-my-homework excuses. Instead, courts must assess whether a party knew of (or should have anticipated) such risks and taken reasonable (and reasonably proportionate) steps to forestall them.

Significantly, although the amended Rule does not specify which party has the "burden of proving or disproving prejudice." The Advisory Committee Notes emphasize that "placing the burden of proving prejudice on the party that did not lose the information may be unfair," especially where "the content of the lost information may [not] be fairly evident, the information may … be [] important, or the abundance of preserved information may [be insufficient] to meet the needs of all parties."[39]

Pursuant to amended Rule 37(e)(1), if: (a) ESI was lost that should have been and reasonably could have been preserved; (b) that ESI cannot be replaced or restored; and (c) the loss prejudiced another party, the court has the discretion to order a range of measures to completely cure the prejudice, although the Amended Rule specifies those measures should not be any "greater than necessary to cure the prejudice." Nevertheless, a court may conclude that "serious measures are necessary to cure prejudice found by the court, such as forbidding the party that failed to preserve information from putting on certain evidence, 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" and even "exclud[ing] a specific item of evidence to offset prejudice caused by failure to preserve other evidence," just as long as the "curative measures under subdivision (e)(1) do not have the effect of measures that are permitted under subdivision (e)(2) "[40]

By contrast, amended Rule 37(e)(2) authorizes what the Committee describes as "very severe measures to address or deter failures to preserve" ESI, but if and only if the court finds "that the party that lost the information acted with the intent to deprive another party of the information's use in the litigation."[41] This tough test was "designed to provide a uniform standard in federal court for use of these serious measures when addressing failure to preserve electronically stored information." Indeed, it repudiates the more lenient standard exemplified by *Residential Funding Corp. v. DeGeorge Financial Corp*.,[42] which "authorize[s] the giving of adverse-inference instructions on a finding of negligence or gross negligence."[43]

Among the "very severe" sanctions authorized by subdivision (e)(2) are both adverse inference "instructions that permit or require the jury to presume or infer that lost information was unfavorable to the party that lost it" and "traditional missing evidence instructions based on a party's failure to present evidence it has in its possession at the time of trial."[44] The Advisory Committee Notes additionally suggest that courts exercise caution in imposing any of the discretionary "measures specified in (e)(2)," especially "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."

Finally, and perhaps most importantly, prejudice need not be proved to justify one of Rule 37(e)(2)'s "severe sanctions." To the contrary, prejudice is conclusively presumed. "This is because the finding of intent required by the

subdivision can support not only an inference that the lost information was unfavorable to the party that intentionally destroyed it, but also an inference that the opposing party was prejudiced by the loss of information that would have favored its position."[45] Thus, subdivision (e)(2) "does not require any further finding of prejudice."[46]

III. Amendments to Rules 26(c), 26(d), 26(f), 34(b), 4(m), 16(b), 55, 1, 84 and the Official Forms

Nine other Rules have been amended in various ways. Some are pro-plaintiff. Many are not. Few are very consequential. In order of importance (ranked, in large part, by the number of comments addressed to the Advisory Committee when the amendments were still in the proposal/drafting stage), the most significant amendments are as follows.

Amended Rule 34(b)(2), which concerns "Responses and Objections" to discovery requests now provides:

> (A) Time to Respond. The [responding] party … must respond in writing within 30 days after being served—if the request was delivered under Rule 26(d)(2)—within 30 days after the parties' first Rule 26(f) conference. …
>
> (B) Responding to Each Item. … [Any objection] … must … state … with specificity the grounds for objecting …. The responding party may state that it will produce copies … instead of permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.
>
> (C) Objections. An objection must state whether any responsive materials are being withheld on the basis of that objection. …

The advantages of these changes to plaintiffs seeking documents (especially amended Rule 34(b)(2)(b)'s requirement that objections must be made with "specific[ity]" and amended Rule 34(b)(2)(c)'s command that a responding party "must state whether" it has withheld "any responsive materials …") is readily apparent. The Advisory Committee's Notes state:

> [t]his amendment should end the confusion that frequently arises when a producing party states several objections and still produces information, leaving the requesting party uncertain whether any relevant and responsive information has been withheld. ... The producing party does not need to provide a detailed description or log of all documents withheld, but does need to alert other parties to the fact that documents have been withheld and thereby facilitate an informed discussion of the objection.Although these Rule changes may lead to more litigation of discovery disputes, compliance with the amendments should resolve some of the issues that otherwise arise all too frequently from vague discovery responses and blanket objections.

Rule 26(c), which generally covers discovery protective orders, has been amended in one seemingly small way, adding just seven words to a single sub-division. Amended Rule 26(c) now provides:

> (c) Protective Orders.
>
> (1) In General. A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending—or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:
>
> . . .
>
> (B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery; …

Adding the phrase "allocation of expenses" expressly authorizes—and implicitly encourages—what already had become a common practice by parties responding to discovery requests, their penchant to seek reimbursement of the purportedly outrageous costs of responding to "oppressi[ve]" or "undu[ly] burden[some] or expens[ive]" discovery requests.[47] In the short run, this change will likely lead to more such motions and further satellite litigation. In the long run, this essentially "requester pays" amendment may be the camel's nose opening the door to the tort "reformers" dream palace, to a regime in which all discovery is "requester pays" regime and all litigation is governed by the "English Rule" (in which the "loser pays") instead of the "American Rule" (in which each party bears its own costs). Such a change would put an end to discovery as a tool for uncovering the truth, as defendants would be able to manipulate the purported cost of providing discovery to make justice unaffordable to most individual litigants. Importantly, however, the Advisory Committee has made clear it intended no such change, "Recognizing the [court's] authority [to impose cost-shifting] does not imply that cost-shifting should become a common practice. Courts and parties should continue to assume that a responding party ordinarily

bears the cost of responding."[48] Litigants should remind courts that cost-shifting should be considered only in the most extraordinary circumstances.

Rule 26(d), which covers the "timing and sequence of discovery, has been amended to allow parties to deliver Rule 34 requests before the Rule 26(f) discovery planning conference. Amended Rule 26(d) now provides:

> (d) Timing and Sequence of Discovery.
>
> 1) Timing. A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.
>
> (2) Early Rule 34 Requests.
>
> (A) Time to Deliver. More than 21 days after the summons and complaint are served on a party, a request under Rule 34 may be delivered:
>
> (i) to that party by any other party, and
>
> (ii) by that party to any plaintiff or to any other party that has been served.
>
> (B) When Considered Served. The request is considered to have been served at the first Rule 26(f) conference.
>
> (23) Sequence. Unless, on motion, the parties stipulate or the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice: …

Conforming changes also have been made to amended Rule 34.

Rule 26(f) has been amended to add preservation and Rule 502 orders to the topics parties should address at the discovery planning conference.

Rule 4(m) has been amended to accelerate the progress of cases once a complaint has been filed. The Rule 4(m) period to serve has been shortened from 120 to 90 days. Similarly, the Rule 16(b) period to issue a scheduling/case management order has been trimmed from 120 to 90 days. Although these changes are simply procedural, all practitioners must be aware of them lest they miss the shortened deadlines. Indeed, the change to the time allowed for service is the first rule change to affect our cases.

Rule 16(b) has been amended to encourage early and active case management. The language of Rule 16(b)(1) language has been altered to encourage "live" case management conferences with the court. Rule 16(b)(3) has been amended to (i) add preservation and Rule 502 orders to the topics judges should consider addressing in their case management orders; and (ii) encourage pre-motion conferences concerning discovery disputes.

Rule 55 has been amended to make clear that a court is authorized to revisit the entry of a partial default judgment at any time until the entry of a final judgment.

Rule 84 and the Official Forms have been completely eliminated as out-of-date and superfluous, although Forms 4 and 5 now are appended to Rule 4. This is a politically motivated change, as the comments and testimony about the proposed amendments made clear. The former Official Forms included a sample complaint often cited to show that the concept of notice pleadings was not completely abrogated by the Supreme Court's decisions in *Ashcroft v. Iqbal*[49] and *Bell Atlantic Corp. v. Twombly*.[50] By deleting the Forms, the authors of this Rule amendment apparently intended to delete this argument.

Finally, Rule 1, which remains an entirely aspirational statement of the Rules' overall "scope and purpose,"

has been amended to encourage the courts (as well as the parties) to "employ" the Rules (and not just "construe" them) in order "to secure the just, speedy, and inexpensive determination of every action and proceeding." In some ways, the change to Rule 1 is a metaphor for the changes to the Rules generally. The language change itself— changing "construe" to "employ"—does not seem terribly significant. The danger is that courts may decide that because something has changed, they have a new mandate to restrict discovery more than they have in the past. It is up to those of us who litigate on behalf of individuals against institutional defendants to remind the courts that discovery is not only the key that enables every litigant access to the relevant evidence but it is the key that unlocks the civil justice system, and that bending that key or tossing it away endangers the most important principles of our civil justice system: the quest for truth, access to the courts, equal justice for all, and a complete remedy for all injuries.[51] ▲▲▲

Ned Miltenberg is Co-Managing Partner of the National Legal Scholars Law Firm, P.C. (NLSLF), in Washington, DC. He formerly served as ATLA's Associate General Counsel and as Senior Litigation Counsel for AAJ and AAJ's Center for Constitutional Litigation (CCL). He was named a co-winner of "Trial Lawyer of the Year" Award by Trial Lawyers for Public Justice (TLPJ), which is now Public Justice (or PJ), and has been elected to the Board of the American Institute of Appellate Practice (AIAP). He has authored 26 book chapters, law review and other articles, and written more than two dozen briefs to the Supreme Court of the United States and scores more to state and federal appellate courts and trial courts on dispositive and discovery motions. He bats right; throws right; bikes often; crashes sometimes; and married way above his head. He can be contacted at NedMiltenberg@gmail.com or 202-656-4490.

Stuart Ollanik of Ollanik Law, LLC in Boulder, CO, represents catastrophically injured plaintiffs, with a focus on products liability, products that endanger children, trucking accidents and discovery issues. He is the co-author of Full Disclosure: Combating Stonewalling and Other Discovery Abuses (AAJ Press), a guide to getting the truth from corporate defendants. He also is the author of over 30 book chapters and articles, has served on the Boards of the ABA's Tort and Insurance Law Journal, the Attorney's Information Exchange Group (AIEG), and Public Justice. He is as an Affiliate of the NLSLF. He can be contacted at stuart@ollanik-law.com or 303-579-9322.

NLSLF is a nationwide law firm composed of 24 of America's leading law professors and other Affiliated (i.e., consulting/non-partner) Scholars, who teach more than 100 subjects and practice in nearly every court, trial and appellate, in the nation. NLSLF provides assistance, on flexible terms, at any stage of a case: from pre-complaint analysis; through discovery, motions, and trial; to post-trial and appellate proceedings in the Supreme Court of the United States and federal and state appellate tribunals. For more information about the NLSLF, see www.nationallegalscholars.com

Endnotes:

[1] Confirmation Hearing on His Nomination to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 55-56 (2005).

[2] *Id*. at 56.

[3] *Hickman v. Taylor,* 329 U.S. 495, 507 (1947) (emphasis added).

[4] See Prof. Patricia W. Hatamyar Moore, *The Anti-Plaintiff Pending Amendments to the Federal Rules of Civil Procedure and the Pro-Defendant Composition of the Federal Rulemaking Committees*, 83 U. Cin. L. Rev. 1083, 1144-52 (2015) (discussing "The Ideological, Demographic, and Experiential Biases of Chief Justice Roberts' Advisory Committee and Standing Committee").

[5] Comments of Professor Arthur R. Miller, New York Univ. School of Law, Regarding Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 9 (Jan. 6, 2014) (avail. at http://www.regulations.gov/#!document Detail;D=USC-RULES-CV-2013-0002-0386).

[6] Miller, *supra* note 5 at 9 (emphasis added).

[7] *Italics* indicate added language; strikeouts indicate deleted language; letters **[A-B]** and numbers **[1-6]** in **[bold brackets]** are guides added by the authors.

[8] Miller, *supra* note 5 at 9.

[9] Joint Comments of Professors Helen Hershkoff (New York University School of Law); Adam N. Steinman (Seton Hall University School of Law); Lonny Hoffman (University of Houston Law Center); Elizabeth M. Schneider (Brooklyn Law School); Alexander A. Reinert (Benjamin N. Cardozo School of Law); and David L. Shapiro (Harvard Law School) Regarding Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure 9 (Feb. 14, 2014) (avail. at www.regulations.gov/#!document Detail;D=USC-RULES-CV-2013-0002-0622. Those Comments were subsequently and fully endorsed by Professors Judith Resnik (Yale Law School); Janet Alexander (Stanford Law School); Stephen C. Yeazell (UCLA School of Law), and 168 other professors who teach Civil Procedure, Torts, and Federal Courts. See Letter of 171 Law Professors Urging Rejection of Changing Federal Rules to Limit Discovery and Eliminate Forms 1 (Feb. 18, 2014) (avail. at www.regulations.gov /#!documentDetail;D=USC-RULES-CV-2013-0002-2078).

[10] Comments of Professor Alan B. Morrison, George Washington Univ. School Law, Regarding Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 9 (Dec. 13, 2013) (avail. at http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0383).

[11] Comment of Judge Shira A. Scheindlin, Regarding Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 2-4 (Jan. 13, 2014) (avail. at http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0398). Judge Scheindlin served on the Advisory Committee from 1999-2006.

[12] *Id*. at 3.

[13] *Id*.

[14] Judge Scheindlin predicted that as a result of the amendments, "defendants will be motivated to contest relevance much more aggressively, obliging judges to decide that question, often at an early stage of the case when relatively little is known about the legal and factual issues in the case. Moreover, the amendment will create incentives for defendants to resist discovery; the result will be to impose delays and added costs, even if the court eventually finds the challenged material to be relevant and proportional. In short, the proposals may prove self-defeating." Miller, *supra* note 5 at 10. Others also predicted the amendments will "invite wasteful satellite litigation over the amendment's purpose and effect—an unintended outcome that would undermine the goal of reducing unnecessary costs and delay." Hershkoff, *supra* note 9 at 8-9 (citation omitted).

[15] Morrison, *supra* note 10 at 10-11.

[16] *See, e.g., General Motors Misled Grieving Families on a Lethal Flaw,* N.Y. TIMES (Mar. 24, 2014); *Takata Saw and Hid Risk in Airbags in 2004, Former Workers Say,* N.Y. TIMES (Nov. 6, 2014).

[17] Scheindlin Comment, *supra*, at 2; Miller, *supra* note 5 at 10; Morrison, *supra* note 10 at 7-8.

[18] Emphasis added.

[19] Report to the Standing Committee Advisory Committee on Civil Rules, May 2, 2014 (emphasis added), hereinafter Adv. Comm.Notes.

[20] *Id*. (emphasis added).

[21] *Id*.

[22] *Id*.

[23] *Id*. (emphasis added).

[24] *Id*. (emphasis added).

[25] *Id*. (emphasis added).

[26] *Id*.

[27] *Id*. (emphasis added).

[28] *Id*.

[29] *Id*. (emphasis added).

[30] *Id*.

[31] *Id*.

[32] *Id*.

[33] *Id*.

[34] *Id*.

[35] *Id*.

[36] *Id*.

[37] *Id*.

[38] *Id*.

[39] *Id*.

[40] *Id*.

[41] *Id*.

[42] *Residential Funding Corp. v. DeGeorge Fin. Corp*., 306 F.3d 99 (2d Cir. 2002)

[43] Advisory Committee Notes.

[44] *Id*.

[45] *Id*.

[46] *Id*.

[47] *Id*.

[48] *Id*.

[49] *Ashcroft v. Iqbal,* 556 U.S. 662 (2009).

[50] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

[51] Four other Rules, Nos. 6, 30, 31 and 32, have been amended in ways that require no discussion.