

Narrowing the Scope of Federal Discovery: The Proposed Amendments to the Federal Rules of Civil Procedure

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According to some estimates, discovery costs account for between 50 and 90 percent of total litigation costs.² Discovery also represents one of the major causes of delay and congestion in the judicial system. Indeed, in many ways, “[discovery] has become the focal point of litigation instead of means to an end.”³

In an effort to streamline costs and delay in litigation, the Judicial Conference Committee on Rules of Practice and Procedure (the “Standing Committee”) published proposed amendments to the Federal Rules of Civil Procedure. PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY AND CIVIL PROCEDURE, pp. 259-60 (Aug. 15, 2013) [hereinafter “PROPOSED AMENDMENTS”]. Unlike previous proposals, which have sought to broaden discovery, this package of proposed rules significantly restricts the scope of discovery and the presumptive number of discovery requests and depositions available.

If the proposed amendments are adopted, discovery requests would be limited to the parties’ “claims and defenses” and tailored to be “proportional to the needs of the case[.]” *Id.* at 265-66. In addition, absent agreement between the parties or a court order, parties would be limited to 5 depositions, 15 interrogatories and 25 requests for admission. *Id.* at 267-68, 300-05,

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² See John H. Beisner, *Discovering A Better Way: The Need For Effective Civil Litigation Reform*, 60 DUKE L. J. 547, 549 (2010).

³ Griffin D. Bell, et al., *Automatic Disclosure in Discovery—The Rush to Reform*, 27 GA. L. REV. 1, 11 (1992).

310-11. The proposed amendments would also require parties to provide more detail in their responses to document requests under Rule 34. Specifically, Rule 34 would require parties to state their objections with specificity and indicate whether any documents were withheld on the basis of an objection. *Id.* at 269, 307.

Along with restricting the scope of discovery, the proposed amendments also clarify the standard for imposing sanctions for a party's failure to preserve discoverable information. Under the proposed amendments, Rule 37(e) would be rewritten to reflect that only willful or bad faith destruction of evidence can result in sanctions, unless the "opposing party's actions . . . irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation." *Id.* at 315. This change is designed, in part, to ensure that potential parties do not engage in unnecessary and expensive "overpreservation" for fear of sanctions in future litigation.

The proposed amendments have received mixed reviews. Corporate defense counsel have generally favored the amendments as advancing early and effective case management and promoting proportionality and cost savings. Others criticize the proposed amendments as being unduly restrictive. *See* Todd Rugur, *Discovery Rule Changes Greeted with Skepticism in Senate*, NAT'L LAW J. (Nov. 11, 2013). For example, U.S. Senator Christopher Coons of Delaware, Chair of the Subcommittee on Bankruptcy and the Court, predicted that reducing the number of depositions, interrogatories and requests for admission would have a negative impact in smaller cases and "could mean that responsible parties will remain unaccountable—not because the plaintiff's allegations are untrue, but because plaintiff lacks the evidence to prove them." *Id.* He was particularly concerned about the effect of the proposed amendments in employment,

discrimination and consumer fraud cases, where most relevant evidence is in the possession of the defendant. This same concern has been raised by plaintiffs' counsel in antitrust cases.

This Article summarizes the most significant proposed rule changes and briefly reviews some of the problems likely to arise when the proposed changes are implemented. For those interested in weighing in on the proposed amendments, the Standing Committee is accepting public comments until February 15, 2014.⁴

The Proposed Amendments to the Federal Rules of Civil Procedure

The Standing Committee has published proposed amendments to the Federal Rules of Civil Procedure aimed at reducing costs and delay in civil litigation. The proposed amendments are based on the recommendations of the Advisory Committee on Civil Rules (“Advisory Committee”) and are specifically designed to increase cooperation among lawyers, proportionality in the use discovery tools, and early and active judicial case management. Toward this end, the Standing Committee proposed significant amendments to Rules 26, 30, 31, 33, 34 and 36 and 37.⁵

⁴ Comments may be submitted online at <http://www.uscourts.gov/RulesAndPolicies/rules/proposed-amendments.aspx> or by mail to:

The Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544

Detailed information regarding how to submit a comment is provided on the website for the United States Courts, at <http://www.regulations.gov/#!faqs;qid=6-2>.

⁵ The proposed amendments also address Rules 1, 4, 16 and 84. Specifically:

- Rule 1 would include a “modest” change and provide that the Rules should be “*employed by the court and the parties* to secure the just, speedy, and inexpensive determination of every action and proceeding.” PROPOSED AMENDMENTS, at 270.
- Rule 4 would be amended to reduce the presumptive time limit for service of a summons and a complaint from 120 to 60 days.
- Rule 16 would be amended to require the court to hold a scheduling conference with the parties face-to-face, by telephone or by other means of simultaneous communication. *Id.* at 262. The proposed change would also reduce the time limit for a judge to issue a scheduling order, providing that, absent good cause, the court must enter a scheduling order “within the earlier of 90 days after any defendant has been served

Redefining the Scope of Discovery? The Proposed Amendments to Rule 26

Rule 26(b) would be amended to provide that a party may obtain discovery of any nonprivileged matter that is relevant to a party's claims or defenses and

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

Id. at 265. A party also would no longer be permitted to seek discovery regarding the "subject matter of the action" upon a showing of "good cause." The Standing Committee determined that the parties should be exclusively limited to requests that are relevant to the claims and defenses identified in their pleadings. *Id.* at 265-66.

The proposed amendment would also remove Rule 26's language extending discovery to evidence that is "reasonably calculated to lead to the discovery of admissible evidence." Instead, the Rule would simply provide that "[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable." *Id.* at 266. This change is intended to underscore that relevance defines the scope of permissible discovery, not some lesser standard. According to the Standing Committee, many judges and lawyers have used the "reasonably calculated" language "as though it defines the scope of discovery" and have improperly expanded discovery beyond its intended scope.⁶ *Id.*

with the complaint or 60 days after any defendant has appeared." *Id.* at 284-85. The proposed amendment also provides that the scheduling order may direct the parties to preserve electronically stored information and/or require the parties to request a conference with the court before moving for an order relating to discovery. *Id.*

- Rule 84 references certain forms that are intended to "illustrate the simplicity and brevity that these rules contemplate." The Standing Committee has recommended that Rule 84 and the associated forms be removed, except for Form 5 (Notice of a Lawsuit and Request to Waive Service of a Summons) and Form 6 (Waiver of the Service of Summons). The Committee is concerned that the forms may be out of date and inadequate in light of heightened pleading standards and case law developments. *Id.* at 276-77.

⁶ Compare *Smith v. Bayer Material Sci., LLC*, 2013 WL 3153467, at *3 (N.D. W.Va. June 19, 2013) (suggesting that discovery need not be "relevant" to be discoverable; "the Court finds that the request is relevant, or at least

Cutting Back on the Number of Depositions

Currently, Rules 30 and 31 establish a presumptive limit of 10 depositions by oral examination or written questions per side. In addition, Rule 30(d)(1) presumptively limits each oral deposition to seven hours over the course of one day. The proposed amendments would cut the presumptive number of depositions in half and limit each oral deposition to six hours.⁷ *Id.* at 267.

The supporting report of the Advisory Committee noted that “[s]etting the limit at 5 does not mean that motions and orders must be made in every case that deserves more than 5 – the parties can be expected to agree and should manage to agree, in most of these cases. But the lower limit can be useful in inducing reflection on the need for depositions among the parties, and – when those avenues fail – in securing court supervision.” *Id.* at 268. Moreover, the standard for obtaining additional depositions under the proposed amendment is intended to be lenient – the court “must grant a party leave to the extent consistent” with the general scope of discovery. *Id.* at 268, 305.

In addition, the Advisory Committee was convinced that this proposed change would likely have little impact in most cases, considering statistics assembled by the Federal Judicial Committee. Specifically, “it appears less than one-quarter of federal court cases result in more than five depositions, and even fewer in more than ten.” *Id.* at 268. The hope, however, is that

reasonably calculated to lead to the discovery of admissible evidence”); *Metro Pony, LLC v. City of Metropolis*, 2011 WL 2729153, at *2 (S.D. Ill. July 13, 2011) (“[T]he scope of discovery under the Federal Rules of Civil Procedure is broad in scope, permitting discovery ‘regarding any nonprivileged matter that is relevant to any party’s claim or defense’ or that ‘appears reasonably calculated to lead to the discovery of admissible evidence.’”) (emphasis added), with *Arnott v. U.S. Citizenship & Immigration Servs.*, 2012 WL 8609607, at *1 (C.D. Cal. Oct. 10, 2012) ([following 2000 amendments] “[T]he scope of discoverable information []may now be stated as follows: any unprivileged matter relevant to the claim or defense of any party, and/or relevant information reasonably calculated to lead to the discovery of admissible evidence.”).

⁷ Neither the Pennsylvania Rules of Civil Procedure nor the county local rules impose a presumptive limit on the number or duration of depositions. Expert depositions, however, are generally unavailable. See PA. R. CIV. P. 4003.5.

the “change will result in an adjustment of expectations concerning the appropriate amount of civil discovery.” *Id.*

Cutting Back on the Number of Interrogatories and Requests for Admission

The proposed amendments would also reduce the presumptive number of Rule 33 interrogatories from 25 to 15, including subparts. The Standing Committee reasoned that “15 will meet the needs of most cases, and that it is advantageous to provide for court supervision when the parties cannot reach agreement in the cases that may justify a greater number.” *Id.* at 268. The Standing Committee has also proposed a presumptive limit on the number of requests for admission under Rule 36. The proposed amendment would “add a presumptive limit of 25 [that] expressly exempts requests to admit the genuineness of documents, avoiding any risk that the limit might cause problems in document-heavy litigation.”⁸ *Id.* at 267-68. Currently, there is no limit on the number of requests for admission that may be propounded under the federal rules.⁹

Requiring Less “Evasive” Responses to Requests for Production

Rule 34 would be amended to require parties to state their objections to documents requests with “specificity” and to “state whether any responsive materials are being withheld on the basis of that objection.” *Id.* at 269. This proposed change addresses the “common lament that Rule 34 responses often begin with a ‘laundry list’ of objections, then produce volumes of

⁸ The Pennsylvania Rules of Civil Procedure do not impose any numerical limit on the number of interrogatories or requests for admission. Several counties across Pennsylvania, however, do impose presumptive numerical limits on the number of interrogatories and/or requests for admission. *See, e.g.*, CUMBERLAND COUNTY LOCAL R. CIV. PRO. 4005-1 (limiting parties to 40 interrogatories and 40 requests for admission, including the subdivisions of each request, absent agreement among the parties or a court order); LYCOMING COUNTY LOCAL R. CIV. PRO. L4005 (limiting parties to 50 interrogatories, including subparts, absent a stipulation or court order. However, “[i]n the event that the response given to the first set of interrogatories is considered by the requesting party to indicate a need for additional interrogatories,” the party may serve an additional 50 interrogatories).

⁹ The Committee also considered but ultimately did not propose adding a presumptive limit to the number of Rule 34 requests for production. *Id.* at 267.

materials, and finally conclude that the production is made subject to the objections. The requesting party is left uncertain whether anything actually has been withheld.” *Id.*

Rule 34 would also be amended to ensure that when a party elects to produce copies of documents or electronically stored information, as opposed to permitting inspection, the party (1) states that the copies will be produced and (2) produces the copies “no later than the time for inspection stated in the request or a later reasonable time stated in the response.”¹⁰ *Id.* at 307.

A Unified Standard for Imposing Sanctions for Spoliation

Currently, Rule 37(e) provides that “[a]bsent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.” There is a circuit split, however, regarding when a party’s failure to retain such information could result in sanctions. The Second, Sixth, Ninth and D.C. Circuits have determined that a negligent failure to preserve information is sufficient, while the Fourth, Fifth, Seventh, Eighth, Tenth and Eleventh Circuits have declined to impose sanctions for negligence.¹¹ The Third Circuit has not ruled on the issue.

Under the proposed amendments, Rule 37(e) would be rewritten in an effort to “replace the disparate treatment of preservation/sanction issues in different circuits by adopting a single

¹⁰ The proposed amendments also would add Rule 26(d)(3), which would permit a party to deliver document requests before the Rule 26(f) conference.

¹¹ *Compare Residential Funding v. DeGeorge Fin.*, 306 F.3d 99, 113 (2d Cir. 2002) (holding that negligent destruction of evidence is sufficient to support the imposition of sanctions); *Beaven v. U.S. Dept. of Justice*, 622 F.3d 540, 554 (6th Cir. 2010) (same); *Glover v. The BIC*, 6 F.3d 1318, 1329 (9th Cir. 1993) (holding that notice of potential relevance of the evidence will suffice to support an adverse inference); *Talavera v. Shah*, 638 F.3d 303, 311 (D.C. Cir. 2011) (upholding trial court’s finding that plaintiff was entitled to a “weak” adverse inference where the “destruction was ‘at worst negligent[.]’”) with *Hodge v. Wal-Mart Stores*, 360 F.3d 446, 450 (4th Cir. 2004) (directing that willful conduct, not negligence, supports the imposition of sanction); *Russell v. Univ. of Tex. of Permian Basin*, 234 Fed. Appx. 195, 207-08 (5th Cir. 2007) (same); *Faas v. Sears, Roebuck & Co.*, 532 F.3d 633, 644 (7th Cir. 2008) (same); *Sherman v. Rinchem Co.*, 687 F.3d 996, 1007 (8th Cir. 2012) (same); *Dalcour v. City of Lakewood*, 492 Fed. Appx. 924, 937 (10th Cir. 2012) (same); *Rutledge v. NCL (Bahamas), Ltd.*, 464 Fed. Appx. 825, 829 (11th Cir. 2012) (reflecting that destruction of evidence has to be in bad faith to support an adverse inference instruction). *See also U.S. v. Laurent*, 607 F.3d 895, 902-03 (1st Cir. 2010) (recognizing that the case law is not uniform regarding the culpability needed to support an adverse inference instruction).

standard.” PROPOSED AMENDMENTS, at 272. Specifically, Rule 37(e) would only permit sanctions where a party’s failure to retain evidence “caused substantial prejudice in the litigation and [was] willful or in bad faith[,]” unless the “other party’s actions ... irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation.” *Id.* at 315. The proposed Committee Note to Rule 37(e) provides that the amendment is intended to address the concerns of potential parties who have engaged in “extremely expensive overpreservation” due to the current divergence of opinion among federal courts addressing the appropriateness of discovery sanctions. *Id.* at 318. The proposed amendment, however, does not provide “‘bright line’ preservation directives because bright lines seem unsuited to a set of problems that is intensely context-specific.” *Id.*

To evaluate a party’s culpability for failing to retain information, the proposed amendment offers a list of factors, including:

- (A) the extent to which the party was on notice that litigation was likely and that the information would be discoverable;
- (B) the reasonableness of the party’s efforts to preserve the information;
- (C) whether the party received a request to preserve the information, whether the request was clear and reasonable, and whether the person who made it and the party consulted in good faith about the scope of preservation;
- (D) the proportionality of the preservation efforts to any anticipated or ongoing litigation; and
- (E) whether the party timely sought the court’s guidance on any unresolved disputes about preserving discoverable information.

Id. at 316-17.

The proposed amendment also emphasizes that the court may adopt “curative measures” when a party fails “to preserve information that should have been preserved in the anticipation or

conduct of litigation,” regardless of the party’s culpability. Such curative measures could include the imposition of costs and fees, requiring a party “to restore lost information, or to develop substitute information” or “permitting introduction at trial of evidence about the loss of information or allowing argument to the jury about the possible significance of lost information.” *Id.* at 272, 321.

Importantly, Rule 37(e) would apply to all information, not just electronically stored information. *Id.* at 314-15 (reflecting that the proposed amendment to Rule 37(e) would change the title to the Rule from “Failure to Provide Electronically Stored Information” to “Failure to Preserve Discoverable Information.”).

Should the Proposed Amendments Be Adopted?

The proposed amendments represent an important step in the effort to curb the upward trend in pretrial costs and delay in federal litigation. And, for the most part, the proposed changes strike a successful balance by maintaining a liberal discovery standard while promoting efficiency and proportionality in the discovery process. For example, the proposed amendment to Rule 34 will increase transparency, requiring parties to communicate whether otherwise discoverable information is being withheld on the basis of an objection. In addition, the proposed amendment to Rule 36 adopts a presumptive limit of 25 requests for admissions, which does not count requests to admit the genuineness of documents. This change will require parties to be more selective in their use of requests for admission and to focus on the material issues in dispute, without restricting their important function in document-heavy litigation.

Other proposed amendments, however, may go too far – particularly the proposed changes to the scope of discovery under Rule 26 and the number of depositions and interrogatories available under Rules 30, 31 and 33. In addition, some view the proposed test for

spoliation sanctions as improperly requiring the party seeking sanctions to prove that it was prejudiced by the destruction of evidence, even where the destruction was in bad faith.

The Shifting Scope of Rule 26

Under the current rules, discovery is limited by the principle of proportionality. “On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by [the Rules] or by local rule if it finds that the burden or expense of the proposed discovery outweighs its likely benefit[.]” FED. R. CIV. P. 26(b)(2)(C)(iii). The proposed amendments, however, take this familiar limiting principle and use it to define the scope of discovery. *See* PROPOSED AMENDMENTS, at 296 (“Although the considerations are familiar, and have measured the court’s duty to limit the frequency or extent of discovery, the change incorporates them into the scope of discovery that must be observed by the parties without court order.”).

This is a significant rule change that may on occasion generate inequitable results. “Proportionality” is an amorphous standard that requires the court to make a judgment about the reasonableness of a party’s approach to discovery. This standard may lead to unpredictable and wide-ranging interpretations and encourage early and expensive motion practice over the basic parameters of discovery. This is particularly the case considering that it may be difficult to determine how beneficial a discovery request will be “in resolving the issues” or “the likely benefit of discovery” before the parties have exchanged responsive information. Early in the discovery process, rather, the “amount in controversy” and the “importance of the issues at stake” will likely be the predominate factors in assessing the proportionality of a request. Judges and parties will on occasion significantly disagree about the proper scope of discovery in a case that is perceived by the court to be worth X dollars when the party values the same case at Y dollars, or that involves a particular legal issue that might generate important precedent for

similar cases in the future. In any event, differing views of what is a reasonable amount of discovery given the money or legal issues at stake will inevitably yield varying results.

Further, in view of the other proposed changes to the rules, litigants may be more inclined to invoke Rule 26(b)(2)(C)(iii)'s existing proportionality standard to prevent abuse of the discovery process. The proposed amendments have significantly restricted the presumptive number of discovery requests and depositions and limited discovery to information relevant to the parties' "claims and defenses." These changes make clear that old expectations about open-ended federal discovery are gone. If parties more freely file motions invoking the existing proportionality standard in light of these changes, then there is less of a need to realign the available scope of discovery. To encourage parties to file such motions, where appropriate, Rule 26(b)(1) could instead be amended to specifically refer to proportionality as an important limiting principle that should be invoked in appropriate cases.

The Standing Committee also recommends deleting from Rule 26(b)(1) the point that "[r]elevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence" and replacing it with "[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable." The purpose of the change is to ensure that discovery is directed only to relevant evidence. The "reasonably calculated" language, however, embodies a well-established legal principle that is supported by a wealth of case law. Removing this language marks a significant change in the manner in which relevance is defined in the discovery context and raises questions regarding the continued validity of numerous cases decided based on the existing standard.

An alternative would be to retain the "reasonably calculated" language, but highlight the fact that all discovery sought must be relevant. For instance, Rule 26(b)(1) could be amended to

provide: “This scope of discovery includes relevant information that may not be admissible in evidence, provided it is reasonably calculated to lead to the discovery of admissible evidence.”¹²

Restricting the Number of Depositions and Interrogatories

One of the most impactful changes proposed by the Standing Committee is the reduction of the presumptive number of depositions from 10 to 5 per side. The Standing Committee relies on statistics reflecting that “less than one-quarter of federal court civil cases result in more than five depositions, and even fewer in more than 10.” PROPOSED AMENDMENTS, at 268. These statistics are drawn from the number of depositions taken by attorneys in closed cases that featured at least one deposition.¹³ This data, therefore, incorporates those cases that would have produced more depositions but were resolved early through settlement or motion practice. With one exception, the statistics reflect that more than five depositions are taken by one side or the other in 40% of cases involving an expert and non-expert deposition.¹⁴ Considering these issues, the accuracy of the Standing Committee’s conclusion that the new presumptive limit will have “no effect in most cases” is subject to question. *Id.* at 268.

Lawyers may wonder whether it may be will difficult for a party to secure a court order allowing depositions beyond the presumptive number, even where there is a good faith rationale for the request. It remains to be seen whether some courts will view the new presumptive limit as a screening device or an inflexible barrier to more extensive discovery by applying a “one size fits all” approach. It is not difficult to foresee that securities fraud, antitrust or complex products

¹² *Cf. Payne v. Belgarde Prop. Servs., Inc.*, No. 11-5094, 2012 WL 5986537, at *5 (D.S.D. Nov. 29, 2012) (“Rule 26(b) limits the scope of discovery to relevant information, which ‘need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.’”) (citation omitted); *Arnott v. U.S. Citizenship & Immigration Servs.*, No. 10-1423, 2012 WL 8609607, at *1 (C.D. Cal. Oct. 10, 2012) ([following 2000 amendments] “[T]he scope of discoverable information []may now be stated as follows: any unprivileged matter relevant to the claim or defense of any party, and/or relevant information reasonably calculated to lead to the discovery of admissible evidence.”).

¹³ Memorandum, Emery Lee, III to Duke Subcommittee, March 15, 2013, at pp. 2-4.

¹⁴ *Id.* at 4 (“To the extent that a presumptive limit of five total depositions will affect civil cases, those effects are likely to be felt in cases with expert depositions.”).

liability cases involving multiple expert witnesses would readily justify an extension of the new presumptive limit on depositions. It is also not difficult to foresee one side using the presumptive limit as a tactical device to stall and constrict discovery the other side needs to adequately prepare a case for trial or dispositive motion practice.

Rather than cutting the presumptive limit of depositions in half, it may be more appropriate to amend Rules 30 and 31 to expressly allow parties to file motions to limit the number of an opponent's depositions based upon the proportionality principles set forth in Rule 26(b)(2)(C)(iii). This compromise would enable litigants to take more than 5 depositions without having to seek the approval of their opponent or the court, but where warranted provide a vehicle for a party to urge the court to conform the scope of deposition discovery based upon the proportionality factors, including the value of the case and the legal issues.

Similarly, the proposed amendment to Rule 36 places a significant limit on the presumptive number of interrogatories available, reducing the number from 25 to 15 (including subparts). In all but the most straightforward cases, 15 interrogatories may not suffice. As a result, parties may have to resort to early and expensive motion practice to secure additional interrogatories seeking relevant information, particularly considering that other discovery tools, such as depositions, are not as freely available under the proposed amendments.

The proposed amendments, therefore, should clearly communicate that the presumptive limits are not a "one size fits all" approach to the discovery needs of all cases or particularly classes of cases. It is true that a reduction in the presumptive limits may encourage parties to be more selective in their use of discovery tools. But, if applied inflexibly, these limits could distract the parties (and the court) from the substantive issues in the case and unnecessarily

constrict legitimate discovery of relevant evidence. This point should be specifically addressed in the proposed rule changes or the amended commentary.

A New Standard for Sanctions Under Rule 37(e)

The proposed amendment to Rule 37(e) provides a new standard for the issuance of sanctions for spoliation of evidence, permitting sanctions only where the court finds: (1) that the party's actions "caused substantial prejudice in the litigation and [was] willful or in bad faith;" or (2) the party's actions "irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation." PROPOSED AMENDMENTS, at 314-15.

This proposed amendment already has one significant critic, U.S. District Court Judge Shira Scheindlin of the Southern District of New York, the author of the landmark e-discovery opinion in *Zubulake v. UBS Warburg*. In a recent opinion, Judge Scheindlin ruled that a party's intentional destruction of evidence justified an adverse inference instruction. *Sekisui America Corp. v. Hart*, 2013 WL 4116322 (S.D.N.Y. Aug. 15, 2013). Judge Scheindlin reasoned that "When evidence is destroyed intentionally, such destruction is sufficient evidence from which to conclude that the missing evidence was unfavorable to that party. As such, once willfulness is established, no burden is imposed on the innocent party to point to now-destroyed evidence which is no longer available *because the other party destroyed it.*" *Id.* at *7.

Judge Scheindlin took the opportunity to criticize the proposed amendment to Rule 37(e), writing:

The Advisory Committee Note to the proposed rule would require the innocent party to prove that "it has been substantially prejudiced by the loss" of relevant information, even where the spoliating party destroyed information willfully or in bad faith. I do not agree that the burden to prove prejudice from missing evidence lost as a result of willful or intentional misconduct should fall on the innocent party. Furthermore, imposing sanctions only

where evidence is destroyed willfully or in bad faith creates perverse incentives and encourages sloppy behavior.

Id. at *4 n.51 (citation omitted). Judge Scheindlin’s opinion was issued on the same day that the proposed amendments were circulated for public comment.

Judge Scheindlin’s point regarding the appropriate burden of proof is persuasive. It is well-established that the burden should lie with the party best able to provide information about the question at issue. *See Cooper v. Oklahoma*, 517 U.S. 348, 366 (1996) (“[T]he difficulty of ascertaining where the truth lies may make it appropriate to place the burden of proof on the proponent of an issue[.]”). The rule change should address this issue and clarify whether the party seeking sanctions is required to prove prejudice by the other party’s willful failure to preserve the evidence.

The proposed amendment, however, does not necessarily “create[] perverse incentives and encourage sloppy behavior.” Although the proposed amendment limits the district court’s ability to issue sanctions, it also encourages the court to order curative measures (to the extent possible), regardless of whether bad faith or substantial prejudice are present. The court, for example, could direct a party “to restore lost information, or to develop substitute information” or permit the introduction of evidence at trial “about the loss of information or allow[] argument to the jury about the possible significance of lost information.” PROPOSED AMENDMENTS, at 321. The court could also order a party to pay the reasonable expenses caused by the failure to preserve the information, including attorney’s fees. *Id.* at 272. Therefore, a party that negligently fails to preserve relevant evidence could still face negative consequences at trial and during the discovery process. These adverse consequences should serve to encourage litigants to engage in reasonable and diligent document and data preservation practices.