Rule 1

" . . . just, speedy, and inexpensive . . . "

Western District Of Wisconsin Bar Association

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In this issue: You are invited to attend the WDBA Annual Meeting, and its luncheon, CLE program and reception, on Thursday, June 11, 2015 (pp. 2 and 23). The keynote address by Marquette University Law School Dean Joseph D. Kearney, will be *The Wisconsin Supreme Court: Can We Help?* A link to the Registration Form is in the e-mail accompanying this electronic version and that Form will be an insert in the mailed version. Jen Gregor and Mark Hancock analyze the vital litigation tool of Rule 45 subpoenas and how best to use them (pp. 1, 3-6). Chase Horne and Deb Meiners identify some traps for those seeking to remove cases to federal courts and how to avoid them (pp. 6-8) and Clerk Oppeneer reminds practitioners that the court will likely notice those who fall into removal traps in ways that practitioners may not want to be noticed (p. 8). Rich Moriarty examines and critiques the paradigm shift in the federal discovery rules due to take effect on December 1, 2015 (pp. 9-22). Enjoy!

Birth Announcement: WDBA happily announces the birth of its redesigned website at www.wdbar.org. We hope you enjoy the new look and feel, and we continue to welcome any ideas for content and improvement.

Subpoenas Under Rule 45—An Important Tool, Yet Often Misunderstood

Jennifer Gregor and Mark Hancock, Godfrey & Kahn, S.C.

A powerful tool in the litigator's arsenal is the ability to subpoena witnesses for testimony and documents. As the discovery process unfolds, third parties often possess critical evidence or can offer key testimony that can only be obtained through the subpoena power. At trial, third party witnesses and certain party employees may be outside the subpoena power of the court, thus making subpoenas an important part of pretrial strategy and planning.

Federal Rule of Civil Procedure 45 governs the issuance of subpoenas by district courts, both during discovery and for trial. Litigators must be familiar with the nuances of the rule. Mistakes with subpoenas, especially near the close of discovery or shortly before trial, can be costly, as can disagreements with opposing counsel about the requirements of Rule 45. The rule is also worth close examination, even by experienced litigators, because it has been frequently (and recently) amended. We provide here an overview of the most recent amendments to the rule, the mechanics of subpoenas, common strategic issues that arise with subpoenas during discovery and at trial, and some practical tips for subpoenas in your practice.

The 2013 Amendments to Rule 45

Rule 45 was most recently amended in 2013, which modified the rule in four important ways. First, subpoenas now issue from the court where the action is pending, rather than where the performance of the subpoena is to occur, i.e., the production, inspection, or testimony. In many instances, the prior rule effectively required securing local counsel in that district merely to issue the subpoena. The new rule obviates the need for local counsel in many cases.

Second, the amendments greatly simplify the process for serving a subpoena. Deponents or witnesses may now be served anywhere they can be found. The prior rule allowed for national service under some narrow circumstances, but generally restricted service to the district or state where the subpoena had been issued or within 100 miles of the place where the subpoena was to be performed.

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Western District of Wisconsin Bar Association 2014-2015

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President's Corner

By Jeffrey A. Simmons

It's that time again. The WDBA's Annual Luncheon and CLE program is coming up on Thursday, June 11.

Our luncheon speaker this year is Marquette Law School Dean Joseph Kearney, who is always an entertaining speaker. His topic is *The Wisconsin Supreme Court: Can We Help?* Our luncheon this year will be held at the Concourse Hotel. The luncheon will be from 12-1:30 p.m., but arrive early to get a good seat and mingle with friends, adversaries, and judges.

As usual, the luncheon will be followed by our annual CLE program, which includes a report from Clerk of Court and Magistrate Judge Peter Oppeneer, a panel discussion on the upcoming changes to federal discovery rules and a presentation on coordinating civil and criminal remedies for trade secret misappropriation. The CLE program will conclude with the Judge's Panel, Western District judges who will answer all of your burning questions about practice before the Court.

Afterward, you are all invited for drinks, snacks and more conversation with the judges, court staff and WDBA members at the Courthouse.

The day's agenda appears on page 23. A registration form is linked in the email accompanying the electronic of this issue and will be an insert in the mailed version.

See you there!

Rule 45

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Third, the amendments clarify the limits of the court's subpoena power. The new version of the rule maintains the requirement that non-party witnesses can only be compelled to attend a hearing or deposition within 100 miles of where the witness resides, is employed, or regularly transacts business. With respect to trials, non-party witnesses can be compelled to attend a trial occurring anywhere in the state the witness resides, is employed or regularly transacts business, *so long as* that the attendance does not impose a substantial expense to the witness. The central difference in the new version of the rule is that it is now clear that officers of a corporate party can only be compelled to attend a deposition, hearing, or trial within 100 miles of where the witness resides, is employed, or regularly transacts business (or anywhere within the state where the witness resides, is employed, or regularly transacts business). Some courts had interpreted the old rule to compel corporate officers of a party to attend a trial anywhere in the country. The amendments resolved this split in authority and make it clear that the power to subpoena corporate officers is, even for trial, limited in geographic scope. The Committee Notes confirm, however, that no subpoena is required for party depositions, and thus corporate officers, directors and managing agents are still required to attend depositions upon notice and without the geographic restrictions stated in Rule 45.

Fourth, the procedures for complying with and challenging a subpoena were amended. The rule now makes it clear that motions to compel or quash a subpoena should be brought in the district where compliance with the subpoena is to occur. This change attempts to shield subpoenaed parties from undue burden and expense by allowing for challenges to subpoenas in their home court. Rule 45(f), which is entirely new, allows for some flexibility in this regard and permits parties to move to transfer motions to compel or quash from the court where compliance was required to the court that issued the subpoena "if the person subject to the subpoena consents or if the court finds exceptional circumstances."

The Mechanics of Subpoenas

The federal subpoena forms are readily accessible on the website for the Western District of Wisconsin at http://www.wiwd.uscourts.gov/forms. The subpoena must meet the geographic requirements discussed above and be accompanied by witness fees and mileage at the current rate, which are currently $40 per day and 57.5 cents per mile. *See* 28 U.S.C. § 1821 and 5 U.S.C. § 5704; *see also* U.S. General Services Administration mileage rates at http://www.gsa.gov/portal/content/100715.

Service of the subpoena must be made by a nonparty adult; the rule requires "delivery" of a copy of the subpoena to the named "person." Although the majority rule is still that personal service of subpoenas is required, interestingly, the Seventh Circuit has recently suggested in *dicta* that service by certified mail was sufficient. *See Ott v. City of Milwaukee*, 682 F.3d 552, 557 (7th Cir. 2012). The Seventh Circuit explained that: "We see no reason to inflate the costs of litigation by ruling out this sensible option for serving a subpoena (along with the necessary fees) and requiring parties to hire a second person for service. . . ." *Id.*

In responding to a subpoena, objections must be served in writing "before the earlier of the time specified for compliance or 14 days after the subpoena is served." *See* Fed. R. Civ. P. 45(d)(2)(B). Any motion to quash or modify a subpoena must be made in the court for the district in which compliance is required, and must be made "timely," which usually means that it must be filed before the date specified by the subpoena for compliance. *See* 9 James Wm. Moore et al., *Moore's Federal Practice* § 45.50[1] (3d ed. 2015).

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Discovery Subpoenas – Strategic Considerations

Common subpoena issues during discovery include: timing of subpoenas and third-party discovery, disputes concerning subpoena burdens to third parties, and cost shifting for subpoenas. One important strategic consideration regarding third-party discovery is one of timing. Frequently, and for good reasons, parties try to obtain as much evidence as possible from their adversary before turning to third parties. In courts with relatively swift case schedules such as the Western District, this can lead to difficulty having relevant information before critical deadlines, if not managed well from the beginning. Litigants should note that the addition of new Rule 45(f), allowing transfer of a motion to quash from the court where the witness resides to the case where the action is pending, may cause additional timing challenges if there is a delay in effectuating the transfer.

Another frequent consideration in third-party discovery is the burden subpoenas place on nonparties. It has long been a requirement under Rule 45 that the attorney or party serving the subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. *See* Fed. R. Civ. P. 45 (d)(1) ("[t]he court . . . must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply"). The Rule also requires that if a court orders compliance with a subpoena over an objection "the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance." Fed. R. Civ. P. 45(d)(2)(B)(ii).

The Seventh Circuit and the Western District have both held that the "undue burden" standard, at least in the context of document subpoenas, is "a balancing test, where the court must consider whether the burden of compliance exceeds the benefit of the information sought." *Ameritox Ltd. v. Millennium Health, LLC*, No. 15-CV-31, 2015 WL 420308, at *2 (W.D. Wis. Feb. 2, 2015) citing *Northwestern Mem'l Hosp. v. Ashcroft*, 362 F.3d 923, 927 (7th Cir. 2004). Additionally, both the Ninth Circuit and the D.C. Circuit have held that cost shifting is mandatory in instances where a nonparty incurs significant expense because of compliance with a subpoena. *See Legal Voice v. Stormans, Inc.*, 738 F.3d 1178 (9th Cir. 2013); *Linder v. Calero-Portocarrero*, 251 F.3d 178 (D.C. Cir. 2001).

In practice, the scope of many subpoenas are negotiated or modified to attempt to alleviate or at least compromise on the burden imposed. Although subpoena compliance can be significantly costly in certain circumstances, compliance is usually not reimbursed completely. It is imperative that counsel and parties issuing subpoenas not unduly burden third parties; serious sanctions can result from not heeding this requirement. Likewise, if subpoenaed non-parties are going to seek significant reimbursement, they should be cautions to preserve objections and to raise reimbursement requests early to take full advantage of the protections the rule provides against burdens caused by subpoenas.

Trial Subpoenas – Strategic Considerations

As noted, it is now clear under Rule 45 that the ability to compel the attendance of corporate officers at trial is limited. This clarification raises a number of thorny questions of trial strategy. For instance, under the current version of the rule, corporate officers living and working exclusively in Chicago could not be compelled to testify at a trial in Madison. If the corporate officer is unwilling to voluntarily testify -- and there might be strategic reasons for corporate officers to refuse to make themselves available -- the opposing party's only option is to use deposition testimony of those officers.

This situation can lead to an unwieldy process, both pre-trial and during trial. With respect to pre-trial procedure, the parties will have to provide Rule 26(a)(3) deposition designations. Since these depositions designations are the only way to ensure that testimony from corporate officers are included at trial, parties will rightly feel compelled to include all possible designations that might need to be used during the trial. This is a potentially onerous task in complex cases, particularly if video depositions will be used.

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With respect to procedure during trial, the use of deposition testimony, whether by performance or by video, is obviously less than optimal when compared to live testimony. Furthermore, some crafty (or perhaps cunning) defendants could list, in its Rule 26(a)(3)(A)(i) disclosures, various corporate witness as only those that "it may call if the need arises." If so, the plaintiff might be forced to put on testimony through deposition designations only to later have that witness called for live testimony by the defendant.

That particular example raises another issue: If corporate officers refuse to testify at a trial but then attend the trial in person, does Rule 45 provide a way to compel their live testimony? Under a strict reading of the rule, the answer is no. In the Chicago/Madison example, the corporate officers do not reside or regularly work in Wisconsin or within 100 miles of Madison, and thus the rule provides no way to compel their testimony even though they might be in the courtroom. Under this reading of the rule, then, corporate officers of a defendant could sit through the trial, watch their deposition testimony be read or played by the plaintiff, and then be called for live testimony by their own counsel later in the trial. It is a separate issue, of course, whether that strategy would ever make sense or whether these sharp tactics would accomplish more than annoying judges and juries. Indeed, some judges might try to leverage their more generalized powers for managing trials and the presentation of evidence to convince the parties to reach an agreement about the presentation of witnesses to avoid these sorts of situations. Rule 45, however, does not itself provide courts with any such authority.

The Seventh Circuit's decision in *McGill v. Duckworth*, 944 F.2d 344 (7th Cir. 1991) provides an interesting case study for many of these principles. The plaintiff, an inmate, brought a § 1983 action against prison guards and prison officials after he was raped by another inmate. At trial the plaintiff wanted to call three of the defendants as witnesses. One week before trial, however, he learned that these defendants were not going to attend the trial. On the first day of trial he thus asked the district judge to order their appearance. The district judge suggested that the defendants be subpoenaed, but the plaintiff's counsel declined that invitation – likely because he knew (or at least suspected) that the defendants no longer lived or worked within the geographic confines of the court's subpoena power. Instead, the plaintiff asked that the judge use his "'inherent power as a judge'" to compel their attendance at trial; the district judge refused, finding no basis for such authority.

The Seventh Circuit affirmed: "Relying on 'inherent powers' to compel the attendance of a witness who is outside the court's subpoena power would make the restrictions in Rule 45(e) meaningless. McGill chose not to subpoena the three, even after the judge insisted that this was his only recourse. The district judge was correct in refusing to order their appearance in the absence of a subpoena." *Id.* at 354. Interestingly, there was no discussion as to the possibility of using deposition testimony for these three defendants, though that might be explained by the fact that plaintiff was never able to articulate what testimony he hoped to elicit from these defendants.

In the end, the best way around most of these issues is for the parties to engage in pretrial discussions to clarify exactly which witnesses are most likely to testify and to negotiate a way to make those witnesses available for trial. Nevertheless, parties need to guard against the fact that Rule 45 provides various tools for an opponent to engage in potentially costly machinations.

Practice Tips

To take full advantage of subpoenas as a discovery device and as part of trial strategy, practitioners will be well served to become familiar with the various requirements of Rule 45. We provide here some tips for use in your own practices:

- Review Rule 45 as a checklist to ensure all requirements are satisfied before service of any subpoena.
- Consider service by agreement or certified mail to save on service costs.
- Plan third-party discovery with ample time to address any motions for compliance before critical case deadlines. Remember to keep in mind the swiftness of the Western District of Wisconsin and the (likely slower) speeds of courts for districts in which compliance will occur.

- When the cost of subpoena compliance may be substantial, raise reimbursement requests promptly, make objections to preserve and potentially trigger Rule 45(d)(2)(B)(ii) and cost shifting, and be prepared to provide detailed estimates and records of anticipated and actual expenses.
- Be thoughtful, from an early point in your case, about the fact that it may be impossible to compel various witnesses to testify at trial, and recognize that the ability to compel a given witness might change over the course of the case. Keep these considerations in mind as you prepare and take depositions.
- In order to avoid potentially unnecessary expenses and surprises, be proactive in discussing issues of witness appearances at trial with opposing counsel witness appearances at trial with opposing counsel.

Removal Jurisdiction: What Could Possibly Go Wrong? Quite A Bit, Actually.

Chase A. Horne and Deborah C. Meiners

Removal is not always the most thrilling of procedural obstacles a practitioner might face in the life of a case. Attorneys tend to think of removal as a pretty straightforward proposition. Is there federal question jurisdiction, or diversity jurisdiction with at least $75,000 in dispute? Yes? Then you can remove.

A simple hypothetical, however, illustrates that removal can actually be more complicated than many attorneys expect. Allow us to illustrate:

You represent a corporation in a business dispute pending in federal court somewhere, outside of your client's home state. Your client's insurer is defending under a reservation of rights, and at some point that insurer decides to bring a declaratory judgment action to seek a determination of its duties to defend and indemnify. The insurer files suit in state court in South Dakota, your client's home state. In addition to your client, the insurer also names as defendants in its declaratory judgment action all the other parties involved in the underlying business dispute. One of the other defendants contacts you to see whether you will consent to removal, and you agree that removal is a good idea for various reasons. So do all the other defendants in the declaratory judgment action. Although there is no federal question at issue, you methodically perform your analysis under 28 U.S.C. § 1332 and confirm that there is complete diversity among all parties. That makes a potentially messy situation a little cleaner, right? Wrong. Say hello to the forum defendant rule.

The Forum Defendant Rule

The forum defendant rule is set forth in 28 U.S.C. § 1441(b)(2), which states:

> A civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

In other words, if the sole basis of removal would be diversity jurisdiction under 28 U.S.C. § 1332(a), then removal is not permitted if any defendant "properly joined and served" is in its forum state. Importantly, the forum defendant rule does not just prevent the forum defendant from removing. It prevents *any party* from removing. It makes the action entirely non-removable.

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Returning to our hypothetical, since your client was sued in its insurer's declaratory judgment action its forum state, the action may not be removed. It does not matter that all the parties agree. You are out of luck. And, since your client was sued in South Dakota, you are *really* out of luck for one additional reason. Namely, in the Eighth Circuit (in which South Dakota lies) the forum defendant rule is jurisdictional and cannot be waived even if not the subject of a timely motion to remand. *See Hurt v. Dow Chem. Co.*, 963 F.2d 1142 (8th Cir. 1992) (holding that plaintiff did not waive its objection to improper removal where diversity was the sole basis for removal and one of the defendants was a resident of the state in which the action was filed, since jurisdiction "is entirely a creature of statute" and "[i]f one of the statutory requirements is not met, the district court has no jurisdiction"). In all other circuits to address the issue, the forum defendant rule is not jurisdictional, meaning that a plaintiff will waive the argument if it fails to bring a timely motion to remand. *See Lively v. Wild Oats Markets, Inc.*, 456 F.3d 933, 940 (9th Cir. 2006) (collecting cases from First, Second, Third, Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits).

Additional Removal Pitfalls

Let's tweak our hypothetical a little. All facts remain the same, except this time your client's insurer files its declaratory judgment action outside of South Dakota – taking the forum defendant rule out of play. Now you may be able to remove, but your work has still just begun. Your next step is getting consent.

28 U.S.C. § 1446(b)(2)(A) provides as follows:

> When a civil action is removed solely under section 1441(a), all defendants who have been properly joined and served must join in or consent to the removal of the action.

This provision appears to be straightforward. If you want to remove in a multi-defendant action, then the other defendants who been "been properly joined and served" must either "join in or consent to the removal." But what if you do not know whether the other named defendants have been served, or are even aware of the lawsuit for that matter, before the deadline for removing? Consent is required of "all defendants who have been properly joined and served," not of all defendants that a removing party is *aware* have been properly joined and served. Stated otherwise, the standard is service, not knowledge of service.

This means the corporation in our above hypothetical must exercise reasonable diligence in determining whether other named defendants have been properly served so that their consent can be obtained *before* removing the case.

Does this really mean that a removing defendant could be in the unenviable position of having to investigate the status of service on all other named defendants – defendants who may still be unaware of the litigation – just to satisfy its "reasonable diligence" obligation? Yes. *See Pianovski v. Laurel Motors, Inc.*, 924 F. Supp. 86, 87 (N.D. Ill. 1996) ("A phone call to the Clerk and an instruction to a docketing employee are insufficient to demonstrate diligence. Laurel should have taken further action to determine whether Chase had been served, such as attempting to contact Chase."); *see also Keys By Washington v. Konrath*, No. 93 C 7302, 1994 WL 75037, at *2 (N.D. Ill. Mar. 10, 1994). In fact, the failure to demonstrate reasonable diligence or compliance with procedural requirements may render a notice of removal defective, and a court may not permit a removing party to subsequently cure a defective notice. *See Smith v. Argent Mortgage Co., LLC*, No. CIV. A. 08-65, 2008 WL 2945385, at *2 (E.D. Pa. July 30, 2008). Fortunately, if a defendant has demonstrated reasonable diligence, then the failure to obtain consent from a served defendant would not automatically make a notice of removal defective. *See Milstead Supply Co. v. Casualty Insurance Co.*, 797 F.Supp. 569, 573 (W.D.Tex.1992) (holding that a notice of removal was not defective even though it did not include the consent of a served defendant because the removing defendant had demonstrated reasonable diligence in attempting to ascertain which defendants were served).

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Your job is not over once you obtain the consent of all "properly joined and served" defendants. You must also make sure that the consent of all these defendants is properly conveyed to the court. Can the corporation in our hypothetical satisfy 28 U.S.C. § 1446(b)(2)(A) by stating in its notice of removal that it has consulted with the other defendants, and that all consent to removal? The short answer is no, at least not in the majority of jurisdictions, including the Western District of Wisconsin. Under the majority approach, to "join in or consent" to removal requires that the other named defendants support the notice of removal "in writing." *Stanton v. Graham*, No. 08-CV-492-BBC, 2008 WL 4443283, at *2 (W.D. Wis. Sept. 25, 2008) (internal sources omitted). The conservative approach would be for each named defendant to sign the notice of removal. At the very least, however, the other defendants should file a written notice of consent within the statutory time for filing the notice of removal. *Id.* (*citing* 6 Moore's Federal Practice, § 107.11[1][c] (2008)). Without unanimous consent, you risk a remand back to state court.

Practice Tips

Hopefully this article has highlighted some of the obstacles that commonly trip up removing defendants. We will leave you with a few of practical implications for both plaintiffs and defendants:

For defendants:

- Consider whether the forum defendant has yet been served. If not, then removal could still be possible until the forum defendant becomes "properly joined and served." *See, e.g. Cucci v. Edwards*, 510 F. Supp. 2d 479 (C.D. Cal. 2007) (forum-state residence of defendant corporation could be ignored in determining propriety of removal before it was served).

- Once the forum defendant is served – as long as the forum defendant was not joined fraudulently – then removal becomes impossible (although a plaintiff outside of the Eight Circuit could waive its objections based upon the forum defendant rule if it failed to bring a timely motion to remand).

- Consider the jurisdiction. As stated above, unless in the Eighth Circuit, the forum defendant rule may be waived if the plaintiff fails to file a timely motion to remand.

- Perform your reasonable diligence. Do not wait until the day before the removal deadline to investigate and/or seek consent from other named defendants.

For plaintiffs:

- Serve the forum defendant first. If the forum defendant is served first, then no party will then be permitted to remove the action.

- If the action is removed, file a motion to remand on the basis of the forum defendant rule. The motion must be filed within 30 days after the filing of the notice of removal or it is waived (unless in the Eighth Circuit).

- Stagger service on defendants, even when the forum defendant rule is not at issue. While it would not prevent a defendant from removing,

Clerk's Corner

By Peter Oppeneer, Clerk of Court

Into the Weeds of Diversity

In keeping with the discussion of removal issues in the preceeding article, this Clerk's Corner highlights recurring jurisdictional flaws in the citizenship allegations of complaints and removal petitions based on diversity. Attorneys are repeatedly ensnared in two traps for the unwary – mistaking residence for citizenship and not fully alleging the citizenship of limited liability companies and partnerships.

Unfortunately, (or perhaps fortunately) these mistakes almost never go unnoticed because the court is responsible for policing its own jurisdiction and the Seventh Circuit is relentlessly vigilant in seeing that it does. As a result, many pleadings are greeted with an order from the court to verify the citizenship of the parties or face dismissal for lack of subject matter jurisdiction.

And Now for Something Completely Different: Are the Federal Civil Discovery Rules Shifting Back in Time?

Richard Briles Moriarty[1]

Proposed changes to the discovery rules in the Federal Rules of Civil Procedure signal the most significant paradigm shift in civil law practice since those Rules were adopted in 1938. Are critics correct that the 2105 Rule changes signal a shift backwards, to the discredited days when litigation was "carried on in the dark"?[2]

Setting that question aside, and judged on rule-drafting criteria, the 2015 Rule changes and associated Advisory Committee Notes merit non-passing grades.[3] Yet, with final Congressional approval expected, they take effect on December 1, 2015. Coming soon to a courthouse near you.

The Committee downplays the significance of the 2015 Rule changes by contending that they either codify existing law and practice, implement the intent of prior Rule changes, or constitute modest improvements.[4] Opponents, who are numerous and vocal, predict a sea change.[5] Even proponents who drafted language incorporated into the 2015 Rule changes say that civil law practice will be transformed.[6] Past changes to discovery rules were absorbed by judges and attorneys with relatively minor adjustments. Not with these changes. This paradigm shift, for good or ill,[7] will fundamentally alter the core of civil law practice.

Analyzing the 2015 Rule changes is best commenced by considering core principles, i.e., reasons that the federal discovery rules were adopted in 1938 and how they evolved.

I. Rationales and Purposes of the Federal Discovery Rules.

In 1938, the Supreme Court adopted the Rules of Civil Procedure to revolutionize "the entire concept of [civil] litigation from a cardsclosetothe-vest approach to an opendeck policy."[8] The discovery Rules initially covered only depositions but courts quickly applied them to other discovery tools. In 1946, the Rules caught up to practice by expressly including all discovery tools within the "opendeck" model.[9]

The intended purpose, the Court said in 1947, was to abandon the "earlier and inadequate reliance on pleadings for notice-giving, issueformulation, and factrevelation" and, through broad and inclusive discovery, assure that federal civil trials "'no longer need be carried on in the dark.'"[10] In pre-1938 days, inquiry "into the issues and the facts before trial was narrowly confined and was often cumbersome in method."[11] By clearing the way for "'parties to obtain the fullest possible knowledge of the issues and facts before trial,'" the intent was to "'make a trial less of a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest extent practicable extent.'"[12]

The 1938 paradigm shift opened litigation to the daylight of relatively full disclosure subject to reasonable limits. The new structure was simple and elegant. It trusted attorneys to focus on their clients' actual needs while authorizing courts to minimize and redress problems when intervention was requested and needed. As a general matter, the Rules allowed and encouraged broad and inclusive discovery while investing courts with authority to, on an individualized basis, prevent overreaching through protective orders and other tools.

The Court, in 1984, summarized how the structure functioned: the general "liberality of pretrial discovery permitted by Rule 26(b)(1)" made it "necessary for the trial court to have the authority to issue protective orders" in individual settings.[13] With nearly fifty years experience, the Court perceived that, despite its critics, the structure worked. Though there were, by then, "'repeated expressions of concern about undue and uncontrolled discovery, and voices from this Court have joined the chorus," absent "major changes in the present Rules of Civil Procedure, reliance must be had on what in fact and in law are ample powers of the district judge to prevent abuse" in individualized settings.[14] Thirty years on, that "chorus" is now recast as the lead, the script governing federal civil discovery is turned inside out, and "major changes" are occurring.

Courts know that, with information possessed by litigants often being lopsided, impeding the flow of information generally creates outcome-determinative advantages for defendants. In one case, discovery "misconduct" by Ford Motor Company "completely sabotaged the federal trial machinery, precluding the 'fair contest' which the Federal Rules of Civil Procedure are intended to assure" such that the trial, instead "of serving as a vehicle for ascertainment of the truth, … accomplished little more than the adjudication of a hypothetical fact situation imposed by Ford's selective disclosure of information."[15]

Amendments to the discovery Rules in recent decades have adjusted the scope of allowable discovery or increased judicial oversight in response to perceived abuses. But the generalized broad discovery structure tempered by individualized corrective actions has worked so well that it has essentially remained the same – until now. Each 2015 Rule change should be tested by how it comports with that time-tested structure:

- Is the change consistent with the generalized broad discovery model subject to individualized corrective actions? Would the change better serve those rationales and purposes than do current Rules?
- Instead, would the change significantly diminish or eliminate the generalized broad discovery, subject to individualized corrective actions, that is key to assuring a fair and impartial procedural system? Would the change retreat from the open-deck approach intended by the Rules for nearly eighty years and return to the discredited cardsclose tothe-vest approach that preceded those Rules?

Many of the 2015 Rule changes tend towards closing off discovery as a general matter, regardless of what assigned judges deem appropriate in particular cases, rather than generally encouraging and facilitating broad and open discovery subject to individualized corrective actions by those assigned judges.

Critics of the 2015 Rule changes assert that civil law practice will return to the pre1938 days when information was generally excluded from disclosure, plaintiffs could not properly develop their claims against defendants possessing the bulk of needed information, and litigants were unfairly surprised at trial with facts they should have known. Some critiques are overblown but the 2015 Rule changes do raise serious concerns.

Once courts start implementing the 2105 Rule changes, they may have difficulty reconciling them with holdings that federal discovery rules must be "liberally construed in order to bring about a fair and impartial administration of justice"[16] and that the "deposition-discovery rules are accorded a broad and liberal treatment to effect their purpose of adequately informing the litigants in civil trials."[17] Liberal construction favoring open disclosure has been critical to implementing the intent of the discovery Rules "to assure a fair contest between litigants."[18] Can the 2015 Rule changes, liberally construed, further those purposes?

This round is over except for the bell. But the civil discovery rules are critical to the effectiveness of the civil law system, which in turn is vital to the health of American society and to rational rather than violent conflict resolution. Litigants do not always expect to prevail but do, appropriately, expect to be treated fairly. Expressed dissatisfaction with the 2006 round of amendments was a motivator for the current changes. If sufficient dissatisfaction with the 2105 Rule changes is documented based on concrete problems experienced in real cases, perhaps appropriate changes will be made in the future, informed by the wisdom of the basic structure that has governed civil law discovery since 1938.

Time to consider some selected Rule changes and why concerns are warranted.

II. Shutting down the flow of discovery.

The broad scope of discovery governing civil law practice flows from several spigots. The nature and location of the spigots have changed over the years. But the scope of discovery has remained broad. Relevant information, subject to appropriate controls, has largely flowed freely.

The 2015 Rule changes remove two spigots. The Committee asserts that the "reasonably calculated" provision, was never intended to be a spigot at all, i.e., never contributed to the definition of the scope of discovery, and that the 2015 Rule changes merely correct a prior misunderstanding and change nothing. It also asserts that a second spigot, the broader "subject matter" discovery that courts may open in individual cases, was rarely used and that removing that spigot does not matter because few ever turned it on. These rationales are demonstrably untrue. Removing these two spigots substantially reduces the scope of discovery.

The main remaining spigot is replaced with one that, much smaller and subjected to multiple filters, will leave many litigants high and dry, thirsting for needed information. That replumbing occurs by moving "proportionality" factors from a current Rule providing for individualized court attention into the defined scope of selfinitiated discovery and by substantially changing those relocated factors and adding new ones.

The end result is to significantly constrain discovery at the source, require the judiciary to implement those constraints, and prevent assigned judges from providing relief from those constraints in situations they deem appropriate.

A. Removing the "reasonably calculated" provision.

The definition of the scope of allowable discovery includes a "reasonably calculated" provision. It now states that "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence."[19] The 1946 Committee Notes confirm that the "reasonably calculated" provision was added to "make clear the broad scope" of allowable discovery and to allow "inquiry into matters in themselves inadmissible as evidence but which will lead to the discovery of [admissible] evidence."[20]

The 1946 Advisory Committee Notes stated that the "'Rules ... permit "fishing" for evidence as they should'" and the Court, in 1947, declared that no "'longer can the time-honored cry of "fishing expedition" serve to preclude a party from inquiring into the facts underlying his opponent's case.'"[21] More recent Rule amendments pulled back from encouraging wideopen fishing expeditions but the Rules "still contemplate liberal discovery," relevancy remains "'extremely broad,'" and the "semantic differences between the previous iteration of Rule 26 and its amended successor should not supersede the greater purpose of discovery."[22]

The 2015 Rule changes eliminate the "reasonably calculated" provision. Contrary to history, the Committee asserts that the "reasonably calculated" provision was never part of the "scope" definition and that anyone who thought differently was mistaken because the provision was adopted in 1946 only to respond to problems at depositions.[23] As noted earlier, expanding coverage beyond depositions, to catch up with practice, was a major reason for those 1946 amendments. Then those 1946 amendments "expanded the scope of Rule 26 itself by adding a provision to the effect that inadmissible matter would still be subject to discovery if such matter would reasonably be expected to unearth admissible evidence."[24] The 1946 amendments assured that the "reasonably calculated" provision helped define the scope of all discovery.

How could the current Committee represent that the "reasonably calculated" provision is unrelated to the scope of discovery in the face of decisions by the Supreme Court and by every federal Circuit Court of Appeals to the contrary? The Supreme Court has held that, under the Rules, "a party is entitled as a general matter to discovery of any information sought if it appears 'reasonably calculated to lead to the discovery of admissible evidence.'"[25] The Court has confirmed that Rule 26 permits "discovery" of any relevant information "if it would either be admissible in evidence or "appears reasonably calculated to lead to the discovery of admissible evidence."[26] That the "reasonably calculated" formula is central to defining the scope of discovery is recognized by each of the thirteen federal Federal Circuit Courts of Appeal.[27]

Eliminating the "reasonably calculated" provision will, despite denials by the Committee, substantively restrict the scope of discovery. Determining the effects of slicing the "reasonably calculated" language out of the scope definition cannot be predicted with precision. But examples of how district courts, after the 2000 Rule amendments, used the "reasonably calculated" formula to allow discovery may help. In a racial profiling case, production of "all Traffic Stop Reports" for a five year period was compelled because the "request [was] reasonably calculated to lead to admissible evidence."[28] Broad discovery in an employment discrimination case was ordered based on the "reasonably calculated" provision.[29]

A University was ordered to provide requested information identifying employees "who may have discoverable information" and how to find them since that could assist the plaintiff.[30] Discovery responses were compelled because three discovery topics met that "reasonably calculated" standard and "are within the scope of discoverable information that Plaintiff may seek."[31] Production was also compelled by a court because the "term 'reasonably calculated' means "any possibility that the information sought may be relevant to the subject matter of the action."[32]

Turning off the "reasonably calculated" spigot will restrict discovery that is now allowed.

B. Removing the "subject matter" provision.

From 1938 to 2000, a "subject matter" provision was central to the scope of selfinitiated discovery.[33] 2000 amendments restricted self-initiated discovery while authorizing district courts to order broader discovery: "For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action."[34] The 2015 Rule changes eliminate this court authority by asserting that it is "rarely used" and "virtually never used."[35]

WestLaw captures only some decisions issued by district courts.[36] But even that limited subset confirms that courts invoke this "subject matter" authority with frequency. Before the April 2014 Committee meeting that approved the 2015 Rule changes, the "subject matter" provision was cited in over 1500 decisions.[37] Circling closer to how often courts ordered discovery based on the "subject matter" provision, a second WestLaw search, restricted to decisions in which a motion to compel was likely granted, yielded nearly 500 results for that 14year period.[38] A prominent Tenth Circuit decision, analyzing that provision, rebuffed a challenge to a court invoking its authority to order discovery?[39] Just consulting Wright, Miller & Kane would have conveyed that neither that appellate decision nor the "subject matter" provision is obscure.[40] How could the Committee assert that the "subject matter" provision was "rarely" or "virtually never" used?

To blithely eliminate court-authorized "subject matter" discovery is more startling when it is recognized that, for over sixty years, parties could pursue "subject matter" without advance court approval. Only in 2000 was broad "subject matter" discovery subjected to court approval.[41] Moving "subject matter" discovery from attorney to court control was justified by rationales that "each case must be evaluated on its own circumstances if there is a dispute about the proper scope of discovery for that case" and that "judicial management" of "subject matter" discovery was needed.[42] Committee Notes in 2000 listed examples of subjects appropriate for courtordered discovery beyond what parties could, after 2000, obtain through selfinitiated discovery. Those examples included "other incidents of the same type, or involving the same product" or information "about organizational arrangements or filing systems of a party" or "information that could be used to impeach a likely witness, although not otherwise relevant to the claims or defenses."[43] Courts were encouraged to be flexible in allowing appropriate "subject matter" discovery by "weigh[ing] a host of factors to determine relevancy and reasonableness, including common sense."[44]

Focusing just on the twelve months preceding the April 2014 Committee meeting, courts discharged their responsibilities to affirmatively implement the "subject matter" discovery provision by ordering discovery on that basis,[45] or declining to order discovery on that basis,[46] or by granting some requests for extra "subject matter" discovery while declining other requests.[47] With the 2015 Rule changes eliminating the court authority created in 2000, will even the examples of discovery subjects expressly identified in the 2000 Committee Notes now be offlimits? The current Committee asserts that discovery into those listed subjects "is not foreclosed" by the 2105 Rule changes.[48] Why not? Those subjects were identified in 2000 as ones on which courts could allow discovery not otherwise available; there was no need to grant courts authority to allow discovery already available through self-initiated discovery.

Eliminating judicial authority to allow discovery not encompassed within the scope of self-initiated discovery will foreclose discovery into the subjects identified in 2000 and into other subjects that courts may now authorize. Did the Committee, knowing the frequency with which the "subject matter" provision was used since 2000, eliminate it for undisclosed reasons? The articulated reason, that the provision is "rarely" or "virtually never" used, is demonstrably untrue. The Committee could not have justified that action based on judicial misuse of the authority. Cursory research conveys the care and thoughtfulness that are the general hallmarks of the federal judiciary. But, absent any valid reason, what motivation could there be for eliminating court authority to order "subject matter" discovery other than unwarranted distrust of judges to oversee litigation assigned to them?

A "subject matter" standard defined the scope of self-initiated discovery for decades and , since 2000, has authorized judges presiding over individual cases to allow additional discovery. The Committee shut off another spigot that contributes to the scope of available discovery while denying that its actions had any effect.

C. Replacing, and downsizing, the remaining spigot.

The scope of discovery will now be confined to self-initiated discovery that is a pale imitation of the robust model created in 1938.

1. Adding and deleting language – it matters.

Restrictions imposed on the remaining spigot, the first sentence of Rule 26(b)(1), have received more attention than removal of the other two spigots. Here's how that first sentence now reads, with language deleted by the 2015 Rule changes noted through strikeouts and added language Rule noted through underlining:

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense ~~including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter~~ and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

The Committee contends that deleting language from Rule 26(b)(1) does not matter. To the contrary, the "unmistakable intent of this overhaul of Rule 26(b)(1) is to allow less discovery" despite the Committee's protestations that "these changes will have no effect on current practice" and a Committee Note that the language deleted from Rule 26 "'is so deeply entrenched'" that it "'is no longer necessary.'"[49] Contending that courts will apply the deleted language as if it remained in the Rule is directly contrary to standard construction principles. When the Committee deletes substantive Rule language, that effects substantive change.[50] Efforts by rule-drafters to avoid those consequences as they delete Rule language are unsuccessful.[51] Efforts by advocates to "construe" a Rule from which language was deleted "as if the deletion had not taken place" are also unsuccessful.[52]

Deleting language from Rule 26(b)(1) will significantly constrict the scope of discovery. Courts have cited the language scheduled for deletion to compel (1) the identity of a defendants' clients in a fraud case,[53] (2) all complaints in a suture manufacturer's possession related to the type of suture involved in the plaintiff's claims,[54] (3) personnel files of persons who may not, at trial, qualify as appropriate "comparator employees,[55] and (4) the identity of inmate witnesses over objections about inmate security and privacy.[56] That language was cited to support an order compelling the SEC, in a securities fraud case alleging a CEO failed to disclose commuting expenses as income, to produce detailed information about how commuting expenses of high-level SEC officials are handled even though the comparison would likely fall apart for trial purposes.[57] The Rule itself, not Committee assurances, will determine intent. The deleted language is "deeply entrenched" but the 2015 Rule changes will fill in the trench and bury it while pretending that its actions will not deprive it of air and cause its demise.

The language added to Rule 26(b)(1) also significantly constricts the scope of discovery. While, as the Committee notes, some added language is being moved from Rule 26(b)(2)(C)(iii), that is part of the problem. The movement is from a provision requiring courts to balance competing factors in determining whether "the burden and expense of the proposed discovery outweighs its likely benefit" to a provision that globally restricts the scope of discovery. The same words, used in different contexts, have substantially different meanings and effects.

Genuinely pursuing proportionality in discovery is essential. Control over electronically stored information vastly exceeds human capabilities. We must all become smarter and more focused. Attorneys trained to be paranoid unless they obtain all relevant information must retrain their brains to be at peace with just the information they need.

But do these revisions to Rule 26 fairly balance competing interests to facilitate genuinely useful and targeted discovery? Or does it, in the name of "proportionality," tip the scales of justice in favor of litigants seeking to avoid legitimate and probing discovery? As noted later, other Committee actions suggest that it uses the term to mask other motives.

Time will tell whether transforming Rule 26(b)(1) will have effects on civil law practice similar to the deleterious effects that the Enclosure Acts had on societal relations in England.[58] Many bytes are being consumed on the potential effects of this rewording of Rule 26(b)(1) on the scope of discovery. Rather than travel further down that well-trod path, the author focuses on another potential effect that has escaped attention and, hopefully, will not occur, i.e., courts assuming that they must consider the factors listed in the added language in a hierarchal order.

2. The Rules do not prioritize factors and neither should courts.

A court considering whether discovery would, under the new Rule 26(b)(1), be "proportional to the needs of the case" will likely assume that it may, in its discretion, determine which listed factors apply to the situation presented and then balance applicable factors based on how the court evaluates their relative importance in that situation. Courts generally need not accord priority to one listed factor in an enactment over other factors absent language in the enactment establishing an intended priority.[59] Those assumptions should be correct since the new Rule 26(b)(1) contains no language requiring prioritization.

But a Committee cover Memorandum (not even a Committee Note) implies an intended hierarchy of factors:

> In response to public comments, the Committee also reversed the order of the initial proportionality factors to refer first to "the importance of the issues at stake" and second to "the amount in controversy." This rearrangement adds prominence to the importance of the issues and avoids any implication that the amount in controversy is the most important concern.[60]

With that rearrangement, if an hierarchy of factors was intended, this would be the order in which the factors would need to be considered and weighed:

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.
6. Whether the burden or expense of the proposed discovery outweighs its likely benefit.

Are courts, regardless of how they view the appropriate balance and weight of factors in a particular case, expected to prioritize the "amount in controversy" over the "importance of the discovery in resolving the issues"? Assume the issues involved make requested discovery critically important to resolving those issues. Should discovery be allowed in a case with an estimated value of $1,000,000 but denied in a case with an estimated value of $20,000.

Must courts always prioritize the "amount in controversy" over whether "the burden or expense of the proposed discovery outweighs its likely benefit"? That would flip on its head the analytical structure under the current Rule 26(b)(2)(C)(iii). i.e., courts now determine as an ultimate question whether "the burden or expense of the proposed discovery outweighs its likely benefit" by considering and balancing several factors, including the amount in controversy.[61] Assume the benefit of discovery clearly outweighs its burden or expense in a case valued at $1,000,000. Did the Committee expect that discovery to be available in the $1 million case but unavailable in a case valued at $30,000 because of a lower amount in controversy?

Courts should reject the Committee's suggestion that judicial discretion is constrained by an artificial and inappropriate prioritizing of the factors listed, under Rule 26(b)(1), for determining whether discovery is "proportional to the needs of the case." The Rules convey no intent that the factors are prioritized. The Rules, not a Committee Cover Memorandum, are the proper source of intent on that question.[62]

III. Unfocused early production requests as a means to focus discovery.

The Committee claims a general motivation grounded on proportionality principles. But it created a new provision authorizing early document requests runs directly counter to proportionality principles. Through that new provision, the Committee enlists plaintiffs' attorneys, whom it plainly distrusts, as torchbearers for proportionality – after those attorneys have formally and publicly committed themselves to written discovery requests.

The Rules have long prohibited any party from seeking "discovery from any source before the parties have conferred as required by Rule 26(f)" subject only to a few specified and targeted exceptions.[63] This pre-conference discovery bar is so vital to federal civil practice, and to proportionality principles, that written discovery served in State court proceedings becomes "null and ineffective upon removal."[64] Defendants need not even seek protective orders regarding State court discovery, since it becomes retroactively ineffective upon removal.[65]

The 2015 Rule changes punch a sizeable hole in that preconference discovery bar. Anytime after personal jurisdiction is obtained over a party and 21 days have elapsed, document requests may either be (1) delivered to that party or (2) delivered by that party to the plaintiff or "any other party that has been served."[66] The Committee expected that those early production requests would usually be served before any Rule 26(f) conference since the effective service date will be delayed to the date of "the first Rule 26(f) conference."[67] Defendants have 21 days to respond to Complaints, so early discovery requests will predictably be delivered right after defendants first appear.

Why did the Committee propose this change? The Committee Notes state that this "relaxation of the discovery moratorium is designed to facilitate focused discussion at the Rule 26(f) conference" and that "[d]iscussion at the conference may produce changes in the requests."[68] Really? The Committee recognized in another context that parties may "begin discovery without a full appreciation of the factors that bear on proportionality," that a "party requesting discovery…may have little information about the burden or expense of responding" and that many "of these uncertainties should be addressed and reduced in the parties' Rule 26(f) conference…."[69] But by allowing service of document requests before the Rule 26(f) conference, the Committee invites unfocused requests. How is that supposed to facilitate focused discussion during the conference and to result in discovery consistent with proportionality principles?

The pre-conference discovery bar is designed to encourage "'the parties' proposals regarding discovery [to] be developed through a process where they meet in person, informally explore the nature and basis of the issues, and discuss how discovery can be conducted most efficiently and economically.'"[70] Maintaining that bar without change would facilitate proportionality. Encouraging unfocused formal discovery before any Rule 26(f) conference is contrary to instilling proportionality and to pushing parties to focus their discovery plans.

Service of early document requests that are unfocused could cause recipients to desire more focused discovery. But those recipients will have no control over the content of the requests or whether they are amended. Requestors, not recipients, will unilaterally control decisions over amending those early requests. While individualized court intervention, through protective orders or other measures, will be available, the Committee deems those remedies so inadequate that it developed massive overall changes to discovery rules. So the Committee surely did not deem availability of that intervention regarding early discovery requests a sufficient safeguard to guarantee proportionality. Why did the Committee think that a requestor, after finalizing document requests and formally delivering them to another party, would have increased incentives to "focus" those requests? That is contrary to common experience and common sense.

Attorneys do not now publicly commit to any discovery requests before Rule 26(f) conferences. If they draft requests, planning to finalize them after the Rule 26(f) conference, the requests remain within their offices. Did the Committee assume that an attorney who formally serves requests is more likely to make alterations than while they are in draft format?

If the goal is to motivate parties to focus on discussing proportionality with one another, this creates barricades to that goal. Chief Justice Roberts recognizes that holding conferences amongst Supreme Court members before they start writing is important precisely because there "is a lot less flexibility once something is in writing."[71] After authors deem documents sufficiently final to disclose them to others, even others aligned with the author, defensiveness sets in.[72]

Why create situations in which attorneys must overcome their "pride of authorship" in early discovery requests that, though objectively unfocused, they deemed sufficiently "focused" to serve? If the goal is to encourage discussions during Rule 26(f) conferences about how to focus discovery, why allow the first round to escape that process? That the Committee created this early document request process makes it doubtful that the 2015 Rule changes were motivated by proportionality principles or, instead, by some other agenda. This concern is deepened when one examines the new ESI spoliation Rules.

IV. Making the world safe for spoliation.

Drafting coherent and workable rules to govern preservation and spoliation of ESI and associated remedies is an unenviable task. Though the status quo, without specialized spoliation Rules, is unsatisfactory, it is significantly better than the new regime that will govern ESI.

The 2015 Rules changes will govern only ESI. The conscious choice to refrain from regulating spoliation of other types of discoverable information will result in intriguing disparities. Whether shredding critical paper documents justifies severe sanctions such as default judgment will continue to turn on traditional analysis. For example, did the shredding occur in "good faith" before the shredders knew that litigation was likely[73] or, by contrast, did a defendant failed to take proper steps, after learning of litigation, to assure that paper documents were preserved from ongoing shredding.[74] In situations in which the only distinction is that the information is in paper rather than electronic format, responses to spoliation will be dramatically different. Courts would be allowed to impose severe sanctions for destroying paper documents although they would be unable to impose any sanctions, much less severe sanctions, if the destroyed documents were in electronic format.

Preservation obligations, developed at common law, are vital to the proper functioning of the legal system.[75] Throughout U.S. history, the Supreme Court has enforced spoliation principles.[76] The Committee displays a distrust of federal judges assigned to individual cases by cabining their authority to grant relief. The 2015 Rule changes will deprive victims of spoliation of relief courts have long deemed appropriate.

Imprecision and misdirection by the Committee complicates analysis on such fundamental issues as burden allocation. The law generally imposes "the burden of proof on the party that asserts a contention and seeks to benefit from it."[77] With one exception, the new Rule 37(e) is silent about which side bears burdens on the multiple analytical steps outlined in that Rule. The Committee Notes expressly state that proposed Rule 37(e) "does not place a burden of proving or disproving prejudice on one party or the other" because determining "the content of lost information may be a difficult task in some cases, and placing the burden of proving prejudice on the party that did not lose the information may be unfair."[78]

Leaving burden allocations to courts on the prejudice inquiry is valid. But what did the Committee intend by specifying, only in Committee Notes, that courts may allocate burdens regarding the prejudice inquiry without mentioning burden allocation regarding other analytical steps? Did it intend courts to have allocation power only on the prejudice inquiry while, on all remaining steps, imposing burdens on movants? Did it instead intend broader allocation powers, as some commentators have, perhaps hopefully, assumed?[79] If so, what are they?

Rule interpretation uses statutory construction tools.[80] When part of a statutory structure establishes burdens and other parts do not, that is significant.[81] Statutory ambiguities regarding burdens can cause problems.[82] The Committee's express comments on the prejudice inquiry and conspicuous silence regarding other analytical steps could result in either movants bearing the burdens on those remaining steps or, at best, on application of the principle that "the burden of proof [is imposed] on the party that asserts a contention and seeks to benefit from it."[83] If movants bear the burden on all remaining analytical steps, do burdens to produce evidence on those steps ever shift? Inadequate ruledrafting leaves vital questions unanswered.

If courts must allocate burdens to movants on each remaining analytical step, the potential of appropriate relief in ESI spoliation situations is more unlikely than initial consideration of the new Rule 37(e) may suggest. If they have discretion to allocate burdens, courts may determine that some burdens should appropriately be borne by non-movants since, with each remaining step, valid arguments could be made that either movants or non-movants are the ones asserting the contention and would benefit from it. Courts will need to struggle with these important issues because the Committee did not. Contradictory results on these burden allocation issues, by courts across the country, are predictable.

1. When ESI is lost, either movants must show preservation was required or nonmovants must show preservation was not required. Logically, if lost ESI did not belong in a preservation box, the inquiry should end. But who bears the burden? Limitations on the scope of discovery may make this burden, if imposed on movants, difficult to sustain. When ESI is lost, fairness may, at least on some occasions, call for nonmovants to bear the burden.

2. Next, either movants must show the ESI was lost because a party failed to take reasonable preservation steps or non-movants must show the loss is not attributable to any such failure. Imposing the burden on movants becomes problematic given the substantially restricted scope of discovery. In conducting discovery, how deeply may movants probe into preservation efforts? The 2015 Rule changes affirmatively delete language now used to justify discovery into preservation efforts.[84] As noted earlier, the Committee Notes sought to dispel concerns by stating that discovery of this nature "is so deeply entrenched in practice" that the language "is no longer necessary" but – even if that soothing language had any effect - the Committee created more concerns by stating that preservation-related discovery "should still be permitted under the revised rule when relevant and proportional to the needs of the case."[85] The highlighted phrase emphasizes the newly restricted scope of discovery. Although non-privileged ESI is lost that is "relevant to [the movant's] claim or defense" an extended analysis of multiple factors must occur before one may pursue discovery about preservation efforts.[86] How will parties be able to prove failure to take reasonable preservation efforts if they cannot properly explore what efforts occurred? Constraints on preservation-related discovery make it unfair to impose that burden on movants. But, even if nonmovants bear the burden, those constraints may make it difficult for movants to rebut evidence that reasonable steps were taken.

3. If analysis gets past the first two steps, either movants must prove that the lost ESI cannot be restored or replaced through additional discovery or nonmovants must prove that it can. Constraints on preservation-related discovery will likely also present serious barricades to movants trying to prove this factor, if the burden os imposed on movants. It would not suffice for movants to show it is unlikely the lost ESI can be restored or replaced through additional discovery. They would have to prove that it "cannot" be restored or replaced.[87] Nonmovants will often possess information on restoration and replacement issues. When the first two steps are proven, non-movants would receive primary benefit from the outcome on this third step and should generally be required to prove the lost ESI can be restored or recovered.

Unless movants get past all three of these analytical steps, the inquiry is over and relief is unavailable – even when spoliation actions are egregious. If movants get past all three steps, two alternative avenues may then be pursued, with potential relief coming in two different flavors.

Severe sanctions are available, but only if the party responsible for the ESI loss intended deprivation of the use of the information "in the litigation"? On this step, absent express intent that non-movants bear the burden, it is unlikely that they do. When non-criminal statutes require that a party acted with a specific intent, the opposing party must generally prove that specific intent.[88] The severe sanctions provision requires a specific intent, i.e., an intent that "requires more than a mere general intent to engage in certain conduct or to do certain acts."[89] It would not suffice that a party's action was "practically certain" to achieve the prohibited outcome – the party must have intended to achieve it.[90] To obtain severe sanctions, the party responsible for the ESI loss has to intend deprivation of the use of the information "in the litigation." Even if its destruction indisputably had that practically certain outcome, that would not suffice. Why such a stringent and difficult standard? Spoliation goes to the heart of the judicial process; "the courts must protect the integrity of the judicial process because, "[a]s soon as the process falters ... the people are then justified in abandoning support for the system." Silvestri v. Gen. Motors Corp., 271 F.3d 583, 590 (4th Cir. 2001).

If movants must prove that specific intent, constraining preservation-related discovery will generally prevent that potential. But even if non-movants must prove lack of intent, movants would have difficulty prevailing. If non-movants bear the burden, would they only need to prove intent to do something other than to deprive another party of the use of the lost ESI "in the litigation"? Remember the Bill Gates e-mail? Under proposed Rule 37(e), if it was "lost" because Microsoft intentionally deleted his e-mails to avoid hacker theft, would severe sanctions be precluded although the deletion had the secondary effect of depriving a litigant of use of the e-mail? Remember the plaintiff in Florida who won a multimillion dollar verdict and was then sanctioned because he had, during the litigation, deleted a Facebook photo showing him dancing at a bar? Had the plaintiff deleted the photo so future prospective employers did not see it, would severe sanctions be foreclosed despite the clear relevance of the photo to the litigation?

Remedies other than severe sanctions are available but only if a prejudice inquiry is satisfied. This is where the Committee Notes (though not the Rules) expressly allow burden allocation. As the Committee observed, it is difficult to prove prejudice from lost ESI that was never seen. And with discovery scope restricted, even shifting burdens to nonmovants may leave some movants unable to rebut evidence that the loss was not prejudicial. Regardless of who bears the burden, will movants prevail on prejudice inquiries only where enough evidence associated with the lost ESI remains to allow partial reconstruction or evaluation of context? Will more thorough destruction of ESI, by those with baser motives, escape consequences?

Instilling proportionality into ESI discovery procedures is needed by all parties. Proper spoliation Rules should combine meaningful deterrence with incentives to act smarter and more efficiently by focusing on information that actually matters. The 2015 Rule changes instead favor those seeking to avoid spoliation sanctions at the expense of genuine needs for information.

Courts and practitioners must prepare for the paradigm shift effected by the 2105 Rule changes. They should also consider providing concrete input during the next round of Rule proposals that these changes will likely spawn. A future Committee may be amenable to federal discovery practice being governed, once again, by a Rule structure similar to the one that has worked so well since 1938.

Endnotes:

[1]Views and errors are entirely attributable to the author. He presents his own thoughts and impressions and not those of the WDBA, his employer, or any other entity or person.

[2]*Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1345-46 (5th Cir. 1978), quoting *Hickman v. Taylor*, 329 U.S. 495 (1947).

[3]The author serves on the Evidence and Civil Procedure Committee of the Wisconsin Judicial Council, which analyzes Wisconsin procedural and evidentiary rules and makes recommendations to the Council. In 1988, he drafted the agency rules regarding the Wisconsin Family and Medical Leave Act that largely remain in place today. During the past 25 years, he has also drafted Wisconsin statutes that were enacted. Informed by those drafting experiences, the author submits that rule-drafters must (1) consciously intend each word in any proposed rule or Committee Note and communicate that intent with clarity, (2) assure that any Committee Note states the actual reasons for rule changes to facilitate proper interpretation and application of the associated rule, (3) both be and appear to be fair, impartial and unmotivated by ideology or affiliation, (4) change rules incrementally absent significant reasons to make radical changes, and (5) guard against unintended consequences. On each criterion, the work of the Committee falls short.

[4]Those contentions permeate communications by the Committee. *E.g.*, Rules Appendix B-2 (6/14/14 Memorandum ("federal civil litigation works reasonably well - major restructuring of the system is not needed"), Rules Appendix B-9 (6/14/14 Memorandum ("In the Committee's experience, the subject matter provision" – court authority to order, for good cause, discovery of any matter relevant to the subject matter involved in the action – "is virtually never used" so deleting it doesn't matter)), Rules Appendix B-9 & B-10 (6/14/14 Memorandum (the "'reasonably calculated' phrase [was never intended] to define the scope of discovery" and eliminating that provision merely corrects a misunderstanding of prior Rules, which is displayed through opposing commentary characterizing the phrase as a "'bedrock" definition of the scope of discovery")), Rules Appendix B-14, B-17 & B-18 (6/14/14 Memorandum (spoliation)), Rules Appendix B-39 (Committee Note to proposed Fed. R. Civ. P. 26 (proposed Rule 26 merely "restores the proportionality factors to their original place in defining the scope of discovery" and "does not change the existing responsibilities of the court and the parties to consider proportionality")), Rules Appendix B-39 (Committee Note to proposed Fed. R. Civ. P. 26 (court authority to order, for good cause, discovery of any matter relevant to the subject matter involved in the action was "rarely invoked" so deleting it doesn't matter); Rules Appendix B-44 (Committee Note to proposed Fed. R. Civ. P. 26 (abandoning "reasonably calculated" standard merely corrects a misunderstanding of prior Rules)). The Memorandum and Committee Notes may be found at http://tinyurl.com/mpb9qyo.

[5]*E.g.*, various blogs by Professor Patricia W. Moore at http://tinyurl.com/lumbhgh, http://tinyurl.com/p6s8dac, http://tinyurl.com/nyn7v2f, http://tinyurl.com/nqq7bw9, http://tinyurl.com/lp3llfs, http://tinyurl.com/kdkmjeq, http://tinyurl.com/p9vqvjp, http://tinyurl.com/okhy3v6, http://tinyurl.com/k9wchko, http://tinyurl.com/qzl7e5b, and http://tinyurl.com/pwwfznl. See Steinman, "Some Recent Papers on Discovery, http://tinyurl.com/l63mjey.

[6]Lawyers for Civil Justice, "*FRCP Update: Another Milestone*," (9/17/14), http://tinyurl.com/p7zrv3n.

[7]Some changes make positive forward steps. Requiring that objections to document requests be stated with specificity codifies universally accepted, and oft ignored, decisional law and will, hopefully, minimize boilerplate objections. Proposed Fed. R. Civ. P. 34(b). Similarly, requiring objecting parties to expressly state whether information is actually being withheld based on an objection should reduce confusion and academic motions to compel. *Id.*

[8]*American Floral Services, Inc. v. Florists Transworld Delivery Ass'n*, 107 F.R.D. 258, 260 (N.D.Ill. 1985).

[9]2 *Discovery Proceedings in Federal Court* § 24:1 (3d ed., September 2014). 1970 amendments realigned the Rules, placed the general scope of discovery in Rule 26(b)(1) and transferred specific references to depositions out of Rule 26. *Id.* Subsequent amendments made substantive changes.

[10]*Rozier*, 573 F.2d at 1345-46. See *Schlagenhauf v. Holder*, 379 U.S. 104, 114-15 (1964).

[11]*Hickman*, 329 U.S. at 501.

[12]*Rozier*, 573 F.2d at 1345-46, quoting *U.S. v. Proctor & Gamble Co.*, 356 U.S. 677, 683 (1958), italics added.

[13]*Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34-35 (1984).

[14]*Seattle Times Co.*, 467 U.S. at 34-35 quoting *Herbert*, 441 U.S. at 176-77, italics added.

[15]*Rozier*, 573 F. 2d at 1346.

[16]*American Fruit Growers v. S. T. Runzo & Co.*, 95 F.Supp. 842, 845 (W.D.Pa. 1951).

[17]*Herbert v. Lando*, 441 U.S. 153, 177 (1979).

[18]*Plattner v. Strick Corp.*, 102 F.R.D. 612, 618 (N.D.Ill. 1984). See *Rozier*, 573 F.2d at 1345-46.

[19]Fed. R. Civ. P. 26(b)(1), italics added.

[20]1946 Committee Notes to Fed. R. Civ. P. 26, 28 U.S.C.A Rules 23.1 to 26, p. 462 (2008).

[21]*Cranmer v. Colorado Cas. Ins. Co.*, 2014 WL 6611313, at *5 (D. Nev. November 20, 2014) citing *Hickman,* 320 U.S. at 507. See also *Rosenbaum v. Becker & Poliakoff, P.A.*, 2010 WL 623699, at *1, n.4 (S.D. Fla. February 23, 2010).

[22]*Poole v. Centennial Imports, Inc.*, 2013 WL 3832415, at *3 (D. Nev. July 23, 2013).

[23]Rules Appendix B-9 & B-10 (6/14/14 Memorandum (the "'reasonably calculated' phrase [was never intended] to define the scope of discovery" and eliminating that provision merely corrects a misunderstanding of prior Rules, which is displayed through opposing commentary characterizing the phrase as a "'bedrock" definition of the scope of discovery")); Rules Appendix B-44 (Committee Note to proposed Fed. R. Civ. P. 26 (abandoning "reasonably calculated" standard merely corrects a misunderstanding of prior Rules)); Rules Appendix B-9 & B-10 (6/14/14 Memorandum (the "'reasonably calculated' language was added to the rules in 1946 because parties in depositions were objecting to relevant questions on the ground that the answers would not be admissible at trial").

[24]2 *Discovery Proceedings in Federal Court* § 24:1 (3d ed., September 2014), italics added.

[25]*Degen v. U.S.*, 517 U.S. 820, 825-26 (1996). See *Republic of Ecuador v. Hinchee*, 741 F.3d 1185, 1189 (11th Cir. 2013) (citing this holding in *Degen*).

[26]*Herbert v. Lando*, 441 U.S. 153, 159 (1979). See also *Pillsbury Co. v. Conboy*, 459 U.S. 248, 259, n.18 (1983).

[27]*E.g., Remexcel Managerial Consultants, Inc. v. Arlequin*, 583 F.3d 45, 52 (1st Cir. 2009) (the ""scope of discovery is broad, and 'to be discoverable, information need only appear to be "reasonably calculated to lead to the discovery of admissible evidence"'"); *U.S. v. Kross*, 14 F.3d 751, 754 (2nd Cir. 1994), cert. denied, 513 U.S. 828 (1994); *Pacitti v. Macy's*, 193 F.3d 766, 777-78 (3rd Cir. 1999); *Glover v. South Carolina Law Enforcement Div.*, 170 F.3d 411, 415 (4th Cir. 1999), cert. dismissed, 528 U.S. 1146 (2000); *Crosby v. Louisiana Health Service and Indem. Co.*, 647 F.3d 258, 263-64 (5th Cir. 2011) (vacating a judgment, and remanding for further discovery, because a "discovery request" the district court refused to allow "was at least reasonably calculated to lead to the discovery of some admissible evidence"); *Lewis v. ACB Business Services, Inc.*, 135 F.3d 389, 402 (6th Cir. 1998) (the "'scope of examination permitted under Rule 26(b) is broader than that permitted at trial'" and the "test is whether the line of interrogation is reasonably calculated to lead to the discovery of admissible evidence'"); *Northwestern Memorial Hosp. v. Ashcroft*, 362 F.3d 923, 930 (7th Cir. 2004); *Schoffstall v. Henderson*, 223 F.3d 818, 823 (8th Cir. 2000) (parties in civil litigation "may discover any relevant, unprivileged information that is admissible at trial *or* is reasonably calculated to lead to admissible evidence"); *Surfvivor Media, Inc. v. Survivor Productions*, 406 F.3d 625, 635 (9th Cir. 2005); *Trentadue v. F.B.I.*, 572 F.3d 794, 808 (10th Cir. 2009); *Republic of Ecuador v. Hinchee*, 741 F.3d 1185, 1189 (11th Cir. 2013) (citing *Degen* and holding that Rule 26 "generally entitles a civil litigant "to discovery of any information sought if it appears reasonably calculated to lead to the discovery of admissible evidence"); *In re Sealed Case No. 98-3077*, 151 F.3d 1059, 1069 (D.C.Cir. 1998); *In re MSTG, Inc.*, 675 F.3d 1337, 1342 (Fed.Cir. 2012), reh. en banc denied.

[28]E.g., *Johnson v. City of Fayetteville*, 2013 WL 4039418, *4 (E.D.N.C. August 6, 2013); *Kemp v. Lawyer*, 2012 WL 975821, *2 (D.Colo. March 22, 2012).

[29]*Moore, II v. Shands Jacksonville Medical Center, Inc.*, 2010 WL 5137417, *2 (M.D.Fla. December 10, 2010).

[30]*E.E.O.C. v. University of Phoenix, Inc.*, 2007 WL 1302578, *6-*7 (D.N.M. April 10, 2007).

[31]*Williams v. LVNV Funding LLC*, 2010 WL 4544396 (E.D.Pa. June 29, 2010).

[32]*AMW Material Testing, Inc. v. Town of Babylon*, 215 F.R.D. 67, 72 (E.D.N.Y. 2003).

[33]"Until 2000, the rule required only that the information sought be "relevant to the subject matter involved in the pending action." Wright, Miller, Kane, et al., "Relevancy to the Subject Matter—Admissibility Not Required," 8 *Fed. Prac. & Proc. Civ.* § 2008.

[34]Fed.R.Civ.P. 26(b)(1).

[35]Rules Appendix B-9 (6/14/14 Memorandum ("In the Committee's experience, the subject matter provision" – court authority to order, for good cause, discovery of any matter relevant to the subject matter involved in the action – "is virtually never used" so deleting it doesn't matter)); Rules Appendix B-39 (Committee Note to proposed Fed. R. Civ. P. 26 (court authority to order, for good cause, discovery of any matter relevant to the subject matter involved in the action was "rarely invoked" so deleting it doesn't matter).

[36]George Mason University School of Law, "Law Library Research Guide: Case Finding," http://www.law.gmu.edu/library/guides/casefinding ("some [district court decisions] can be found online, but others can be obtained only from the clerk of the court").

[37]The "ALLFEDS" database in "Terms & Connectors" mode yielded 1510 results with this search: [da(bef 4/1/2014) & "for good cause, the court may order discovery of any matter relevant to the subject matter involved in the action"].

[38]The "ALLFEDS" database in "Terms & Connectors" mode yielded 491 results with this search: [da(bef 4/1/2014) & "for good cause, the court may order discovery of any matter relevant to the subject matter involved in the action" & compel /5 granted].

[39]*In re Cooper Tire & Rubber Co*., 568 F.3d 1180, 1188-90 (10th Cir. 2009).

[40]*E.g*., Wright, Miller, Kane, et al., "Relevancy to the Subject Matter—Admissibility Not Required," 8 *Fed. Prac. & Proc. Civ*. § 2008 (3d ed. updated September 2014).

[41]"Until 2000, the rule required only that the information sought be "relevant to the subject matter involved in the pending action." Wright, Miller, Kane, et al., "Relevancy to the Subject Matter—Admissibility Not Required," 8 *Fed. Prac. & Proc. Civ*. § 2008.

[42]Wright, Miller, Kane, et al., "Relevancy to the Subject Matter—Admissibility Not Required," 8 *Fed. Prac. & Proc. Civ*. § 2008.

[43]2000 Committee Note to Rule 26, 192 F.R.D. 340, 389 (2000). *Herrera v. Santa Fe Public Schools*, 2013 WL 4782160 (D.N.M. August 19, 2013) provides an excellent analysis of the "subject matter" provision and how courts should approach those issues. 2013 WL 4782160 at *14-20.

[44]*Banner Industries of N.E., Inc. v. Wicks*, 2013 WL 5722812, *4 (N.D.N.Y. October 21, 2013).

[45]*E.g., Freres v. Xyngular Corp*., 2014 WL 1320273, *4 (D.Utah March 31, 2014); *In re Hardieplank Fiber Cement Siding Litigation*, 2014 WL 5654318, *2-*3 (D.Minn. January 28, 2014); *F.D.I.C. v. Broom*, 2013 WL 4781706, *1-*3 (D.Colo. September 5, 2013); *Herrera*, 2013 WL 4782160 at *14-20; *F.T.C. v. AMG Services, Inc*., 291 F.R.D. 544, 556-57 (D.Nev. 2013).

[46]*E.g., Thomas v. Mitsubishi Motors Corp*., 2014 WL 280495, *2-*3 (D.Utah January 24, 2014).

[47]*E.g., Noble v. Gonzalez*, 2013 WL 4517774 (E.D.Cal. August 26, 2013).

[48]Rules Appendix B-43 (Committee Note to proposed Fed. R. Civ. P. 26).

[49]Moore, "More Proposed Limitations on the Scope of Discovery," http://tinyurl.com/nqq7bw9.

[50]*Burkhart Through Meeks v. Kinsley Bank*, 804 F.2d 588, 589 (10th Cir. 1986); *Arnold v. Bache & Co*., 377 F. Supp. 66, 67 (M.D. Pa. 1973); *Amin v. Assurant Health*, 2009 WL 959916, at *3 (E.D. Wis. April 7, 2009).

("the approach taken [by the Court in a prior decision] has been seriously questioned in light of the deletion of the 'occurrence or transaction' language from Rule 54").

[51]*E.g*., *United States v. Poland*, 562 F.3d 35, 39 (1st Cir. 2009).

[52]*Badillo v. Cent. Steel & Wire Co*., 495 F. Supp. 299, 302-03 (N.D. Ill. 1980) *amended*, 89 F.R.D. 140 (N.D. Ill. 1981).

[53]*Wirth v. Taylor*, 2010 WL 684966, at *1 (D. Utah February 20, 2010).

[54]*In re Panacryl Sutures Products Liab. Cases*, 2010 WL 3062811, at *2 (E.D.N.C. August 3, 2010).

[55]*Enos-Martinez v. Bd. of Cty. Comm'rs of Cty. of Mesa*, 2011 WL 836478, at *1 (D. Colo. Mar. 7, 2011).

[56]*Anderson v. Hansen*, 2013 WL 428737, at *4 (E.D. Cal. February 1, 2013).

[57]*S.E.C. v. Kovzan*, 2013 WL 647300, at *1 (D. Kan. February 21, 2013).

[58]*E.g*., Rosenman, Ellen. "On Enclosure Acts and the Commons," http://tinyurl.com/k6445bs.

[59]*E.g*., Coleridge v. N. Am. Shipbuilding, Inc., 1993 WL 476532, at *1 (E.D. La. Nov. 10, 1993) (no factor "takes precedence over the others, and the district court has discretion to consider as many of the variables as it wishes); *Air Line Pilots Ass'n, Int'l v. Dep't of Transp*., 791 F.2d 172, 178 (D.C. Cir. 1986) ("the weight to be given to any particular factor lies largely within [the Board's] discretion" and the statute "itself does not dictate that the Board give priority to" one factor over another").

[60]Rules Appendix B-9 (6/14/14 Memorandum).

[61]Fed. R. Civ. P. 26(b)(2)(C)(iii).

[62]See n. 74 *supra*.

[63]Fed. R. Civ.P. 26(1)(d).

[64]*Wilson ex rel. Estate of Wilson v. General Tavern Corp.*, 2006 WL 290490, *1-2 (S.D.Fla. February 2, 2006).

[65]*Sterling Savings Bank v. Federal Ins. Co.*, 2012 WL 3143909, *3-*4 (E.D. Wash. August 1, 2012).

[66]Proposed Fed. R. Civ.P. 26(1)(d)(2).

[67]Proposed Fed. R. Civ.P. 26(1)(d)(2).

[68]Committee Note to Proposed Fed. R. Civ.P. 26.

[69]Rules Appendix B-40 (Committee Note to proposed Fed. R. Civ. P. 26).

[70]*Riley v. Walgreen Co.*, 233 F.R.D. 496, 499 (S.D.Tex. 2005) quoting 1993 Committee Note.

[71]J. Rosen, The Supreme Court 228 (2006).

[72]Kim Yuhl, "Pride of Authorship; When to Defend Your Work and When to Learn From It," (March 5, 2014), http://tinyurl.com/n96gzhd . See U.S. Office of Personnel Management, *Writing and Editing Grade Evaluation Guide*, TS-115, p. 15 (May 1992), http://tinyurl.com/o3lmhsj ("tact and persuasion" are required in "overcoming pride of authorship when negotiating major changes in manuscripts.")

[73]*Ross v. Int'l Bus. Machines Corp.*, 2006 WL 197137, at *5-6 (D. Vt. Jan. 24, 2006) (declining to impose default sanction because evidence indicated that shredders, rather than acting "with gross negligence or willfulness," engaged in shredding before they were alerted to the likelihood of litigation, based on a "good-faith motive of ensuring that [another employee] would not be misled").

[74]*Apple Inc. v. Samsung Electronics Co.*, 881 F. Supp. 2d 1132, 1150-51 (N.D. Cal. 2012) (adverse jury inference ordered as sanction where "Samsung kept the shredder on long after it should have known about this litigation, and simply trusted its custodial employees to save relevant evidence from it").

[75]*American Family Mut. Ins. Co. v. Golke*, 2009 WI 81, ¶ 21, 319 Wis. 2d 397, 411, 768 N.W.2d 729, 735.

[76]*Talbot v. Jansen*, 3 U.S. 133, 156 (1795); *Livingston v. Maryland Ins. Co.*, 11 U.S. 506, 516 (1813).

[77]*Martinelli v. Bridgeport Roman Catholic Diocesan Corp.*, 196 F.3d 409, 428 (2nd Cir. 1999).

[78]Rule Appendix B-63 (Committee Note to proposed Rule 37(e)). See also Rule Appendix B-17 (Memorandum regarding proposed Rule 37(e).

[79] See Scheindlin & Orr, "The Adverse Inference Instruction after Revised Rule 37(e): An Evidence-Based Proposal," 83 Fordham L. Rev. 1299 (Dec. 2014), http://tinyurl.com/q9xgxtu.

[80]*Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 163, 109 S. Ct. 439, 446, 102 L. Ed. 2d 445 (1988).

[81]*E.g., In re Stone*, 199 B.R. 753, 770-72 (Bankr.N.D.Ala. 1996).

[82]*E.g., Apprendi v. New Jersey*, 530 U.S. 466, 475 (2000).

[83]*Martinelli v. Bridgeport Roman Catholic Diocesan Corp.*, 196 F.3d 409, 428 (2nd Cir. 1999).

[84]Rules Appendix B-31 (proposed Rule 26(b)(1)).

[85]Rules Appendix B-43 (Committee Note to proposed Fed. R. Civ.P. 26, italics added).

[86]Proposed Fed. R. Civ. P. 26(b)(1).

[87]Proposed Rule 37(e), italics added.

[88]*Johnson & Johnson Vision Care, Inc. v. CIBA Vision Corp.*, 648 F.Supp.2d 1294, 1366-67 (M.D.Fla. 2009).

[89]*U.S. v. Moore*, 435 F.2d 113, 115 (D.C.Cir. 1970), cert. denied, 402 U.S. 906 (1971).

[90]*Pierre v. Attorney General of U.S.*, 528 F.3d 180, 189-90 (3rd Cir. 2008).

Western District of Wisconsin Bar Association

ANNUAL MEETING AGENDA
THURSDAY, JUNE 11, 2015

Annual Business Meetings
Room 250, U.S. District Courthouse, Madison, Wisconsin

11:00 a.m. Annual Business Meeting of the WDBA followed by Annual Business Meeting of WDBA Pro Bono Fund

Luncheon and Keynote Address
Wisconsin Ballroom, The Madison Concourse Hotel, 1 W. Dayton St., Madison, Wisconsin

11:30 to 12:00 Registration

12:00 noon **Twenty-Third Annual WDBA Luncheon**
Keynote Address: Joseph D. Kearney, Dean, Marquette University Law School
The Wisconsin Supreme Court: Can We Help?

CLE Program and Judges' Panel
Room 250, U.S. District Courthouse, Madison, Wisconsin

1:45-2:35 p.m. **Upcoming Changes to the Federal Discovery Rules (panel discussion)**
Honorable Stephen L. Crocker, Magistrate Judge
Jennifer L. Gregor, Godfrey & Kahn, S.C.
Richard Briles Moriarty, Wisconsin Department of Justice

2:35-2:45 p.m. Break

2:45-3:35 p.m. **Protecting IP And Promoting Justice: Coordinating Civil and Criminal Intellectual Property Litigation**
Timothy M. O'Shea, United States Attorney's Office
Brian L. Levine, Trial Attorney, CCIPS, U.S. Department of Justice
Matthew J. Duchemin, Quarles & Brady, LLP

3:35-3:45 p.m. Break

3:45-4:35 p.m. **State of the Court Report**
Peter Oppeneer, Clerk of Court

Judges' Panel and Discussion

Reception
Second Floor Lobby, U.S. District Courthouse, Madison, Wisconsin

5:00 p.m. - Beverages and hors d'oeuvres

Western District of Wisconsin Bar Association
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