**ASSOCIATION OF INSOLVENCY & RESTRUCTURING ADVISORS**

**Webinar**
**June 15, 2016**
**1:00-2:00 PM EDT**
**(10:00-11:00 AM PDT)**

# TRAPS FOR THE UNWARY: NEW DISCOVERY RULES AND DEVELOPMENTS IN BANKRUPTCY PROCEDURE

## FACT PATTERN, QUESTIONS AND SUPPORTING MATERIAL

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**[Note: The PowerPoint presentation accompanying this webinar on June 15, 2016 contained a typographical error on the slides addressing "Rule 37, Sanctions, etc." The citation to Rule 37(a)(3)(e) should have been a citation to Rule 37(e). Corrected slides have been provided to the AIRA. LRA]**

## FACT PATTERN

**AC Corporation** is an Illinois corporation, which has filed a Chapter 11 in a bankruptcy court in Chicago, seeking to reorganize as Debtor in Possession.

**Alex Collins** is the owner of AC Corp. Collins has filed an individual Chapter 11 in the same bankruptcy court.

**Big Bank** has a long and complex creditor relationship with AC and Collins, holding a security interest in most of AC's assets. Several months before bankruptcy, Bank declared a default under their loan agreement. When Collins asked for some time to find a buyer for his business on an ongoing basis, Bank's Special Assets Officer refused to forbear and simply gave him the name of a liquidator, saying "Good luck." As he walked down the hall after the meeting, he was heard to say, "Game on!" Subsequently, Bank rejected several suggestions for the liquidation of its collateral, resulting in its having to be sold piecemeal for a much smaller aggregate price.

The debtors contend that the Bank's conduct drove down the value of the collateral, violating Bank's obligations under Article 9 of the UCC as well as a fiduciary duty to AC's unsecured creditors, arising from Bank's improper control of AC.

In the bankruptcy court, both DIPs have filed adversary proceedings against Bank. Bank made a jury demand and raised a *Stern* objection to the Bankruptcy Judge's hearing the matter or rendering final orders. Upon Bank's Motion to Withdraw the Reference, the District Judge ruled that the Bankruptcy Judge is to continue to manage the adversary proceedings, on a consolidated basis, until they are ready for trial.

You have been retained as special litigation advisor, to assist both DIPs (the Plaintiffs) in the adversary proceedings. Your investigation has revealed that Bank recently converted to a new computer system and the Special Assets Officer told your client that all of Bank's records of communications related to this loan have been "lost." Your are concerned that Bank will try to bury you with burdensome discovery activity. You note that the civil rules governing discovery procedures were amended December 1, 2015.

## QUESTIONS

1. What new procedures are available to you and the Bankruptcy Judge to expedite case management in the adversary proceedings?

2. What new procedures are available to limit Bank's abusive discovery activity?

3. What new procedures are available to deal with Bank's "loss" of electronically stored information (ESI)?

# SUPPORTING MATERIAL

## SUGGESTIONS FOR ADDRESSING THE QUESTIONS

- See Rule 16(b)(2) and consider seeking implementation of the expedited procedure for a scheduling order since 12/1/15.

- See Rule 16(b)(3)(B)(v) and consider the implication of the practice, encouraged by the 2015 amendments, of adding a requirement to the scheduling order that, before a discovery motion is filed, the movant must request a conference with the court. Could this cut both ways?

- See Rule 26(d)(2) and study the new procedure for early delivery of document requests. How could this procedure be used to make the parties' discovery meeting and the court's scheduling conference more productive?

- See Rule 26(b)(1), under which the standard of discoverability is no longer whether information is "reasonably calculated to lead to the discovery of admissible information." Instead, there is a new "proportionality" standard. How might this be used to protect the plaintiffs from abusive discovery activities?

- See Rule 37(e). How do the new rules affect Bank's "loss" of ESI?

## ANALYSIS AND EXCERPTS FROM SELECTED FEDERAL RULES OF CIVIL PROCEDURE

### (Blacklined to Show Amendments Related to Scheduling and Discovery, Effective December 1, 2015)

### *Introduction*

In the changes in the civil rules, effective December 1, 2015 (which are imported into bankruptcy practice by Parts VII and IX of the Federal Rules of Bankruptcy Procedure), the federal judiciary has reflected a frustration with burdensome discovery activities under the civil rules that are disproportionate to the requirements of justice. The proposed amendments substantially change a number of Civil Rules and fall into three main categories.

- *Case Management:* The 2015 amendments should expedite case management, particularly in the early stages of adversary proceedings.

- *Document Production:* There are changes designed to enhance parties' efforts to preserve and produce documents. The changes seek to make preservation and production easier, while imposing new expectations and standards governing

parties' obligations to preserve information -- especially electronically-stored information -- and changing the implications of failing to meet those obligations.

- *Scope of Discovery:* Finally, there are amendments intended to limit or streamline discovery. They are intended function in a way that will set clearer guidelines for the handling of adversary proceedings and contested matters in bankruptcy and decrease discovery disputes, reduce litigation costs and facilitate more efficient resolution of disputes. These new, limited discovery rules particularly introduce the concept of "proportionality."

## Rule 16. Pretrial Conferences; Scheduling; Management

### *Analysis*

Within 14 days after their meeting, the parties or their attorneys are responsible for submitting to the court a report outlining their discovery plan. F.R.Civ.P. 26(f). Civil Rule 16(b) then requires the judge, either after receiving the report from the parties under Civil Rule 26(f) or after consulting with the parties, to enter a scheduling order limiting the time for pleadings, motions, discovery and other pertinent matters. To facilitate the consultation, the drafters suggest that a "scheduling conference is more effective if the court and parties engage in direct simultaneous communication. The conference may be held in person, by telephone, or by more sophisticated electronic means." 2015 Committee Notes, Civil Rule 16.

"[U]nless the judge finds good cause for delay," the scheduling order must issue within 90 days after the complaint has been served and within 60 days after the appearance of a defendant. F.R.Civ.P. 16(b)(2). These deadlines were reduced in 2015, from 120 and 90 days, respectively. "This change, together with the shortened time for making service under Rule 4(m), will reduce delay at the beginning of litigation." 2015 Committee Notes, Civil Rule 16.

The rule specifically suggests certain contents of the order, with provisions for preservation of electronically stored information (ESI), privilege issues and restriction of motions raising discovery disputes added in 2015.

The addition of the topic of preservation of ESI reflected the increased focus in practice on preservation, in addition to production, of such information. "Parallel amendments of Rule 37(e) recognize that a duty to preserve discoverable information may arise before an action is filed." 2015 Committee Notes, Civil Rule 16.

The addition of a provision in the order directing that, before filing a motion raising a discovery dispute, the movant must request a conference with the court, also reflected the courts' concern over the the evolution of discovery practice. By the time of the 2015 addition to the rule, the Advisory Committee observed that "[m]any judges who hold such conferences find them an efficient way to resolve most discovery disputes

without the delay and burdens attending a formal motion," but the Committee emphasized that "the decision whether to require such conferences is left to the discretion of the judge in each case." 2015 Committee Notes, Civil Rule 16.

**Rule 16. Pretrial Conferences; Scheduling; Management**

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**(b) Scheduling.**

**(1)** ***Scheduling Order.*** Except in categories of actions exempted by local rule, the district judge — or a magistrate judge when authorized by local rule — must issue a scheduling order:

**(A)** after receiving the parties' report under Rule 26(f); or

**(B)** after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference ~~by telephone, mail, or other means~~.

**(2)** ***Time to Issue.*** The judge must issue the scheduling order as soon as practicable, but ~~in any event~~unless the judge finds good cause for delay, the judge must issue it within the earlier of ~~120~~90 days after any defendant has been served with the complaint or ~~90~~60 days after any defendant has appeared.

**(3)** ***Contents of the Order.***

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**(B)** *Permitted Contents*. The scheduling order may:

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**(iii)** provide for disclosure, ~~or~~discovery, or preservation of electronically stored information;

**(iv)** include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under Federal Rule of Evidence 502;

**(v)** direct that before moving for an order relating to discovery, the movant must request a conference with the court;

**(~~v~~vi)** set dates for pretrial conferences and for trial; and

**(~~vi~~vii)** include other appropriate matters.

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**Rule 26. Duty to Disclose; General Provisions Governing Discovery**

***Analysis***

Civil Rule 26(d) requires the parties to meet and confer as required by subdivision (f) before launching into discovery, unless otherwise authorized under the rules, by local rule, order, or agreement of the parties. One such exception is in Civil Rule 26(d)(2), which allows a party to deliver Rule 34 document requests to another party more than 21 days after that party has been served, even before the parties have conducted the required Rule 26(f) conference. The request may be delivered by any party to another party who has been served, and any party who has been served may deliver a request to any plaintiff and to any other party that has been served. Civil Rule 26(d)(2)(A). However, "delivery" is not service of the request. These early requests are not considered to have been served until the date of the first Rule 26(f) conference. Rule 34(b)(2)(A). Then, the time to respond runs from that date.

This relaxation of the discovery moratorium is designed to facilitate focused

> discussion during the Rule 26(f) conference. Discussion at the conference may produce changes in the requests. The opportunity for advance scrutiny of requests delivered before the Rule 26(f) conference should not affect a decision whether to allow additional time to respond.

2015 Committee Notes, Civil Rule 16.

Civil Rule 26(b) starts with the general principle that parties may obtain discovery of most matters that are relevant to the subject matter of the litigation. Discovery of any nonprivileged matter, even if it is not admissible as evidence, is nevertheless permitted if the matter is "relevant to any party's claim or defense and proportional to the needs of the case." Civil Rule 26(b)(1). The proportionality standard was implemented in 2015 and supplanted the long-standing rule that parties could obtain discovery of information not otherwise admissible at trial, provided that the information sought appeared "reasonably calculated to lead to the discovery of admissible information." Civil Rule 26(b)(1) (2000).

> The ["reasonably calculated"] phrase has been used by some, incorrectly, to define the scope of discovery. As the Committee Note to the 2000 amendments observed, use of the "reasonably calculated" phrase to define the scope of discovery "might swallow any other limitation on the scope of discovery." The 2000 amendments sought to prevent such misuse .... The "reasonably calculated" phrase has continued to create problems, however, and is removed by these amendments. It is replaced by the direct statement that "Information within this scope of discovery need not be admissible in evidence to be discoverable." Discovery of nonprivileged information not admissible in evidence remains available so long as it is otherwise within the scope of discovery.

2015 Committee Notes, Civil Rule 16.

In applying the proportionality standard, the focus is on "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." Civil Rule 26(b)(1). At the outset, however, the information must be relevant to be discoverable, although relevancy is a broad concept at this stage of the proceedings. See Harris v. Nelson, 394 U.S. 286, 297, 89 S. Ct. 1082, 1089, 22 L. Ed. 2d 281 (1969).

The 2015 Advisory Committee Notes on Civil Rule 26 reviewed the evolution of the federal discovery standard.

> Restoring proportionality as an express component of the scope of discovery warrants repetition of parts of the 1983 and 1993 Committee Notes that must not be lost from sight. The 1983 Committee Note explained that "[t]he rule

> contemplates greater judicial involvement in the discovery process and thus acknowledges the reality that it cannot always operate on a self-regulating basis." The 1993 Committee Note further observed that "[t]he information explosion of recent decades has greatly increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument for delay or oppression."

The Committee then spoke to its concerns that motivated the development of the current rule:

> What seemed an explosion in 1993 has been exacerbated by the advent of e-discovery. The present amendment again reflects the need for continuing and close judicial involvement in the cases that do not yield readily to the ideal of effective party management. It is expected that discovery will be effectively managed by the parties in many cases. But there will be important occasions for judicial management, both when the parties are legitimately unable to resolve important differences and when the parties fall short of effective, cooperative management on their own.

Liberal discovery remains particularly important in a bankruptcy proceeding, where the purpose of the administration of the debtor's estate is to discover, recover and distribute the assets to the creditors. In re Analytical Systems, Inc., 71 B.R. 408 (Bankr. N.D. Ga. 1987). Relevancy for discovery purposes remains broader than relevancy for evidentiary purposes. See In re American Motor Club, Inc., 129 B.R. 981 (Bankr. E.D.N.Y. 1991). Information may be relevant even if it is not admissible at trial. F.R.Civ.P. 26(b). Thus, relevant information that may be inadmissible at trial for reasons other than relevancy, such as hearsay, speculation and even guessing, may be discovered, subject to the proportionality standard.

The "proportionality calculation" in Civil Rule 26(b)(1) "does not place on the party seeking discovery the burden of addressing all proportionality considerations." 2015 Committee Notes, Civil Rule 26. On the other hand, it is not "intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional. The parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes." Id.

The courts have struggled to strike a balance between the need for information and the increasingly-overwhelming nature of information. See Ahern & MacLean, Bankruptcy Procedure Manual § 7026:3 (2016). In this context, however, it is important to note that the court seeking to determine whether the matter proposed to be discovered is proportional to the needs of the case is to consider, among other things, "the parties' relative access to relevant information, the parties' resources ...." The Committee explained:

> Some cases involve what often is called "information asymmetry." One party

— often an individual plaintiff — may have very little discoverable information. The other party may have vast amounts of information, including information that can be readily retrieved and information that is more difficult to retrieve. In practice these circumstances often mean that the burden of responding to discovery lies heavier on the party who has more information, and properly so.

2015 Committee Notes, Civil Rule 26.

The court may award expenses to the prevailing party on a motion for a protective order and that award is based on Civil Rule 37(a)(5). F.R.Civ.P. 26(c)(3). However, Rule 26(c)(1)(B) also includes an express recognition of the power of a court awarding a protective order to allocate expenses for disclosure or discovery. It was accompanied by the following explanation and cautionary comment:

> Explicit recognition will forestall the temptation some parties may feel to contest this authority. Recognizing the authority does not imply that cost-shifting should become a common practice. Courts and parties should continue to assume that a responding party ordinarily bears the costs of responding.

2015 Advisory Committee Notes, Civil Rule 26. See also Ahern & MacLean, Bankruptcy Procedure Manual § 7054:6 (2016).

**Rule 26. Duty to Disclose; General Provisions Governing Discovery**

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**(b) Discovery Scope and Limits.**

**(1)** ***Scope in General.*** Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense <u>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.</u>

Information within this scope of discovery need not be admissible in evidence to be discoverable. ~~— 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. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).~~

(2) *Limitations on Frequency and Extent.*

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**(C)** *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

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**(iii)** the ~~burden or expense of the~~ proposed discovery is outside the scope permitted by Rule 26(b)(1)~~outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues~~.

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**(c) Protective Orders.**

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

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**(B)** specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery;

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**(d) Timing and Sequence of Discovery.**

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**(2)** ***Early Rule 34 Requests.***

**(A)** *Time to Deliver.* More than 21 days after the summons and complaint are served on a party, a request under Rule 34 may be delivered:

**(i)** to that party by any other party, and

**(ii)** by that party to any plaintiff or to any other party that has been served.

**(B)** *When Considered Served.* The request is considered to have been served at the first Rule 26(f) conference.

**(~~2~~3)** ***Sequence.*** Unless~~, on motion,~~ the parties stipulate or the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

**(A)** methods of discovery may be used in any sequence; and

**(B)** discovery by one party does not require any other party to delay its discovery.

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**(f) Conference of the Parties; Planning for Discovery.**

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**(3)** ***Discovery Plan.*** A discovery plan must state the parties' views and proposals on:

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**(C)** any issues about disclosure, ~~or~~discovery, or preservation of electronically stored information, including the form or forms in which it should be produced;

**(D)** any issues about claims of privilege or of protection as trial-preparation materials, protection as trial-preparation materials, including — if the parties agree on a procedure to assert these claims after production — whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502;

## Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes

### *Analysis*

Amended Civil Rule 34(b)(2) starts by spelling out the procedure governing responses and objections to document requests.

The response is due within 30 days after service. F.R.Civ.P. 34(b)(2)(A). However, if the request was delivered prior to the parties' 26(f) meeting, then an early request is not deemed to have been served until that meeting occurs and the 30-day response time is measured from that date. F.R.Civ.P. 34(b)(2)(A).

The party served with a document request is required to respond item-by-item, stating in writing whether the production or inspection will be permitted as requested or stating any objections. Instead of permitting inspection, the response may simply say that copies of the documents will be produced. Rule 34(b)(2)(B) (as amended, eff. Dec. 1, 2015). In addition to simply stating the objections, the response must also state whether anything is being withheld on the basis of the objection. Rule 34(b)(2)(C) (as amended, eff. Dec. 1, 2015). The drafters explained that this requirement "should end the confusion that frequently arises when a producing party states several objections and still produces information, leaving the requesting party uncertain whether any relevant and responsive information has been withheld on the basis of the objections." 2015 Advisory Committee Notes, Civil Rule 34. The Committee also provided helpful clarification of the nature of this part of the objection:

> The producing party does not need to provide a detailed description or log of all documents withheld, but does need to alert other parties to the fact that documents have been withheld and thereby facilitate an informed discussion of the objection. An objection that states the limits that have controlled the search for responsive and relevant materials qualifies as a statement that the materials have been "withheld."

2015 Advisory Committee Notes, Civil Rule 34.

**Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes**

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**(b) Procedure.**

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(2) *Responses and Objections.*

**(A)** *Time to Respond.* The party to whom the request is directed must respond in writing within 30 days after being served or — if the request was delivered under Rule 26(d)(2) — within 30 days after the parties' first Rule 26(f) conference. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

**(B)** *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state ~~an objection~~ with specificity the grounds for objecting to the request, including the reasons. The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.

**(C)** *Objections*. An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest.

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

### *Analysis*

Civil Rule 37(e) makes an exception to the enforcement rules, based on a perception that there is particular difficulty in handling some discovery issues where electronic data is involved. It was refined in 2015, along with parallel changes in Civil Rules 16 and 26, and now protects a party from sanctions in the terms of the blacklined version below.

Civil Rule 37(e) thus starts with an emphasis on the failure to *preserve* electronically stored information (ESI), rather than on the failure to *produce* it. Failure to produce is the subject of Civil Rule 37(d).

> It authorizes and specifies measures a court may employ if information that should have been preserved is lost, and specifies the findings necessary to justify these measures. It therefore forecloses reliance on inherent authority or state law to determine when certain measures should be used. The rule does not affect the validity of an independent tort claim for spoliation if state law applies in a case and authorizes the claim.

2015 Advisory Committee Notes, Civil Rule 37. The Rule also places the initial focus on whether the loss can be remedied through additional discovery.

The rule only applies when ESI is lost and the drafters recognized that, because ESI "often exists in multiple locations, loss from one source may often be harmless when substitute information can be found elsewhere." 2015 Advisory Committee Notes, Civil Rule 37. It also applies only if the lost information should have been preserved in anticipation or in the conduct of litigation and the party failed to take reasonable steps to preserve it.

> Many court decisions hold that potential litigants have a duty to preserve relevant information when litigation is reasonably foreseeable. Rule 37(e) is based on this common-law duty; it does not attempt to create a new duty to preserve. The rule does not apply when information is lost before a duty to preserve arises.

Id. Therefore, it may be necessary for the court to decide whether and when a duty to preserve arose.

> Courts should consider the extent to which a party was on notice that litigation was likely and that the information would be relevant. A variety of events may alert a party to the prospect of litigation. Often these events provide only limited information about that prospective litigation, however, so that the scope of information that should be preserved may remain uncertain. It is important not to be blinded to this reality by hindsight arising from familiarity

with an action as it is actually filed.

This duty to preserve in the anticipation or conduct of litigation may arise under common law, by the terms of an order in the case or under some independent requirement that the lost information be preserved. Civil Rules 16(b)(3)(B)(iii) and 26(f)(3)(C), especially as amended in 2015, encourage discovery plans and orders that address preservation, which may form the basis for the duty. See Ahern & MacLean, Bankruptcy Procedure Manual §§ 7016:3 & 7026:3 (2016). On the subject of independent obligations, the commentary is again instructive:

> Such requirements arise from many sources -- statutes, administrative regulations, an order in another case, or a party's own information-retention protocols. The court should be sensitive, however, to the fact that such independent preservation requirements may be addressed to a wide variety of concerns unrelated to the current litigation. The fact that a party had an independent obligation to preserve information does not necessarily mean that it had such a duty with respect to the litigation, and the fact that the party failed to observe some other preservation obligation does not itself prove that its efforts to preserve were not reasonable with respect to a particular case.

2015 Advisory Committee Notes, Civil Rule 37.

The rule is also limited to situations in which ESI was lost because of a failure to take reasonable steps to preserve the information, but perfection is not the standard. "Due to the ever-increasing volume of electronically stored information and the multitude of devices that generate such information, perfection in preserving all relevant electronically stored information is often impossible." Id.

All of this lies against the backdrop of the discovery rules' emphasis on "proportionality," introduced in 2015. In the context of ESI, the Committee clarified the application of the proportionality standard:

> The court should be sensitive to party resources; aggressive preservation efforts can be extremely costly, and parties (including governmental parties) may have limited staff and resources to devote to those efforts. A party may act reasonably by choosing a less costly form of information preservation, if it is substantially as effective as more costly forms. It is important that counsel become familiar with their clients' information systems and digital data -- including social media -- to address these issues. A party urging that preservation requests are disproportionate may need to provide specifics about these matters in order to enable meaningful discussion of the appropriate preservation regime.

2015 Advisory Committee Notes, Civil Rule 37.

After making the threshold determinations that ESI should have been preserved, that it has been lost because a party failed to take reasonable steps to preserve it, that it cannot be restored or replaced through additional discovery, the rule takes a dual approach to sanctions, depending on whether the loss was a result of the party's acting "with the intent to deprive another party of the information's use in the litigation ...." Civil Rule 37(e)(2).

*Merely prejudicial loss of ESI*

Under Civil Rule 37(e)(1), in the absence of such intentional conduct, the rule allows a court to take limited measures only "upon finding prejudice to another party from loss of the information." Such a finding of prejudice must be based, at least in part, on the importance of the information.

> Once a finding of prejudice is made, the court is authorized to employ measures "no greater than necessary to cure the prejudice." The range of such measures is quite broad if they are necessary for this purpose. There is no all-purpose hierarchy of the severity of various measures; the severity of given measures must be calibrated in terms of their effect on the particular case. But authority to order measures no greater than necessary to cure prejudice does not require the court to adopt measures to cure every possible prejudicial effect. Much is entrusted to the court's discretion.

2015 Advisory Committee Notes, Civil Rule 37.

*Intentional loss of ESI*

Under Civil Rule 37(e)(2), however, a court finding that the party that "lost" the information acted with intent to deprive another party of it may use three specified, harsher remedies for addressing and deterring the conduct. These rules have two purposes: (1) to create uniformity in the use of these serious remedies and (2) to reject pre-2015 cases such as Residential Funding Corp. v. DeGeorge Financial Corp., 306 F.3d 99 (2d Cir. 2002) (authorizing giving of adverse-inference jury instructions on finding of mere negligence or gross negligence). The drafters explained:

> Adverse-inference instructions were developed on the premise that a party's intentional loss or destruction of evidence to prevent its use in litigation gives rise to a reasonable inference that the evidence was unfavorable to the party responsible for loss or destruction of the evidence. Negligent or even grossly negligent behavior does not logically support that inference. Information lost through negligence may have been favorable to either party, including the party that lost it, and inferring that it was unfavorable to that party may tip the balance at trial in ways the lost information never would have. The better rule for the negligent or grossly negligent loss of electronically stored information is to preserve a broad range of measures to cure prejudice caused by

its loss, but to limit the most severe measures to instances of intentional loss or destruction.

2015 Advisory Committee Notes, Civil Rule 37. Importantly for bankruptcy practice, the latter goal applies also "to limiting the court's authority to presume or infer that the lost information was unfavorable to the party who lost it when ruling on a pretrial motion or presiding at a bench trial." Again, the drafters clarified that "[s]ubdivision (e)(2) limits the ability of courts to draw adverse inferences based on the loss of information in these circumstances, permitting them only when a court finds that the information was lost with the intent to prevent its use in litigation." Id.

Unlike Civil Rule 37(e)(1), these more harsh remedies based on a finding of intent may be employed even the court's finding prejudice to the party deprived of the information. That finding "can support not only an inference that the lost information was unfavorable to the party that intentionally destroyed it, but also an inference that the opposing party was prejudiced by the loss of information that would have favored its position." Id.

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

**(a) Motion for an Order Compelling Disclosure or Discovery.**

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**(3)** ***Specific Motions.***

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**(B)** *To Compel a Discovery Response.* A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:

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**(iv)** a party <u>fails to produce documents or</u> fails to respond that inspection will be permitted — or fails to permit inspection — as requested under

Rule 34.

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**(e) Failure to ~~Provide~~Preserve Electronically Stored Information.** ~~Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.~~If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

**(1)** upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

**(2)** only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

**(A)** presume that the lost information was unfavorable to the party;

**(B)** instruct the jury that it may or must presume the information was unfavorable to the party; or

**(C)** dismiss the action or enter a default judgment.

# ADDITIONAL MATERIAL

## 2015 COMMITTEE NOTES RELATED TO RULES ABOVE

### Rule 16. Pretrial Conferences; Scheduling; Management

*2015 Committee Note*

The provision for consulting at a scheduling conference by "telephone, mail, or other means" is deleted. A scheduling conference is more effective if the court and parties engage in direct simultaneous communication. The conference may be held in person, by telephone, or by more sophisticated electronic means.

The time to issue the scheduling order is reduced to the earlier of 90 days (not 120 days) after any defendant has been served, or 60 days (not 90 days) after any defendant has appeared. This change, together with the shortened time for making service under Rule 4(m), will reduce delay at the beginning of litigation. At the same time, a new provision recognizes that the court may find good cause to extend the time to issue the scheduling order. In some cases it may be that the parties cannot prepare adequately for a meaningful Rule 26(f) conference and then a scheduling conference in the time allowed. Litigation involving complex issues, multiple parties, and large organizations, public or private, may be more likely to need extra time to establish meaningful collaboration between counsel and the people who can supply the information needed to participate in a useful way. Because the time for the Rule 26(f) conference is geared to the time for the scheduling conference or order, an order extending the time for the scheduling conference will also extend the time for the Rule 26(f) conference. But in most cases it will be desirable to hold at least a first scheduling conference in the time set by the rule.

Three items are added to the list of permitted contents in Rule 16(b)(3)(B).

The order may provide for preservation of electronically stored information, a topic also added to the provisions of a discovery plan under Rule 26(f)(3)(C). Parallel amendments of Rule 37(e) recognize that a duty to preserve discoverable information may arise before an action is filed.

The order also may include agreements incorporated in a court order under Evidence Rule 502 controlling the effects of disclosure of information covered by attorney-client privilege or work-product protection, a topic also added to the provisions of a discovery plan under Rule 26(f)(3)(D).

Finally, the order may direct that before filing a motion for an order relating to discovery the movant must request a conference with the court. Many judges who hold such conferences find them an efficient way to resolve most discovery disputes without

the delay and burdens attending a formal motion, but the decision whether to require such conferences is left to the discretion of the judge in each case.

## Rule 26. Duty to Disclose; General Provisions Governing Discovery

### *2015 Committee Note*

Rule 26(b)(1) is changed in several ways.

Information is discoverable under revised Rule 26(b)(1) if it is relevant to any party's claim or defense and is proportional to the needs of the case. The considerations that bear on proportionality are moved from present Rule 26(b)(2)(C)(iii), slightly rearranged and with one addition.

Most of what now appears in Rule 26(b)(2)(C)(iii) was first adopted in 1983. The 1983 provision was explicitly adopted as part of the scope of discovery defined by Rule 26(b)(1). Rule 26(b)(1) directed the court to limit the frequency or extent of use of discovery if it determined that "the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation." At the same time, Rule 26(g) was added. Rule 26(g) provided that signing a discovery request, response, or objection certified that the request, response, or objection was "not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation." The parties thus shared the responsibility to honor these limits on the scope of discovery.

The 1983 Committee Note stated that the new provisions were added "to deal with the problem of over- discovery. The objective is to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry. The new sentence is intended to encourage judges to be more aggressive in identifying and discouraging discovery overuse. The grounds mentioned in the amended rule for limiting discovery reflect the existing practice of many courts in issuing protective orders under Rule 26(c). . . . On the whole, however, district judges have been reluctant to limit the use of the discovery devices."

The clear focus of the 1983 provisions may have been softened, although inadvertently, by the amendments made in 1993. The 1993 Committee Note explained: "[F]ormer paragraph (b)(1) [was] subdivided into two paragraphs for ease of reference and to avoid renumbering of paragraphs (3) and (4)." Subdividing the paragraphs, however, was done in a way that could be read to separate the proportionality provisions as "limitations," no longer an integral part of the (b)(1) scope provisions. That appearance was immediately offset by the next statement in the Note: "Textual changes are then made in new paragraph

(2) to enable the court to keep tighter rein on the extent of discovery."

The 1993 amendments added two factors to the considerations that bear on limiting discovery: whether "the burden or expense of the proposed discovery outweighs its likely benefit," and "the importance of the proposed discovery in resolving the issues." Addressing these and other limitations added by the 1993 discovery amendments, the Committee Note stated that "[t]he revisions in Rule 26(b)(2) are intended to provide the court with broader discretion to impose additional restrictions on the scope and extent of discovery . . . ."

The relationship between Rule 26(b)(1) and (2) was further addressed by an amendment made in 2000 that added a new sentence at the end of (b)(1): "All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii)[now Rule 26(b)(2)(C)]." The Committee Note recognized that "[t]hese limitations apply to discovery that is otherwise within the scope of subdivision (b)(1)." It explained that the Committee had been told repeatedly that courts were not using these limitations as originally intended. "This otherwise redundant cross-reference has been added to emphasize the need for active judicial use of subdivision (b)(2) to control excessive discovery."

The present amendment restores the proportionality factors to their original place in defining the scope of discovery. This change reinforces the Rule 26(g) obligation of the parties to consider these factors in making discovery requests, responses, or objections.

Restoring the proportionality calculation to Rule 26(b)(1) does not change the existing responsibilities of the court and the parties to consider proportionality, and the change does not place on the party seeking discovery the burden of addressing all proportionality considerations.

Nor is the change intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional. The parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes.

The parties may begin discovery without a full appreciation of the factors that bear on proportionality. A party requesting discovery, for example, may have little information about the burden or expense of responding. A party requested to provide discovery may have little information about the importance of the discovery in resolving the issues as understood by the requesting party. Many of these uncertainties should be addressed and reduced in the parties' Rule 26(f) conference and in scheduling and pretrial conferences with the court. But if the parties continue to disagree, the discovery dispute could be brought before the court and the parties' responsibilities would remain as they have been since 1983. A party claiming undue burden or expense ordinarily has far better information — perhaps the only information — with respect to that part of the determination. A party claiming that a

request is important to resolve the issues should be able to explain the ways in which the underlying information bears on the issues as that party understands them. The court's responsibility, using all the information provided by the parties, is to consider these and all the other factors in reaching a case-specific determination of the appropriate scope of discovery.

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

Restoring proportionality as an express component of the scope of discovery warrants repetition of parts of the 1983 and 1993 Committee Notes that must not be lost from sight. The 1983 Committee Note explained that "[t]he rule contemplates greater judicial involvement in the discovery process and thus acknowledges the reality that it cannot always operate on a self-regulating basis." The 1993 Committee Note further observed that "[t]he information explosion of recent decades has greatly increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument for delay or oppression." What seemed an explosion in 1993 has been exacerbated by the advent of e-discovery. The present amendment again reflects the need for continuing and close judicial involvement in the cases that do not yield readily to the ideal of effective party management. It is expected that discovery will be effectively managed by the parties in many cases. But there will be important occasions for judicial management, both when the parties are legitimately unable to resolve important differences and when the parties fall short of effective, cooperative management on their own.

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

So too, consideration of the parties' resources does not foreclose discovery requests addressed to an impecunious party, nor justify unlimited discovery requests addressed to a wealthy party. The 1983 Committee Note cautioned that "[t]he court must apply the standards in an even-handed manner that will prevent use of discovery to wage a war of attrition or as a device to coerce a party, whether financially weak or affluent."

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

A portion of present Rule 26(b)(1) is omitted from the proposed revision. After allowing discovery of any matter relevant to any party's claim or defense, the present rule adds: "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." Discovery of such matters is so deeply entrenched in practice that it is no longer necessary to clutter the long text of Rule 26 with these examples. The discovery identified in these examples should still be permitted under the revised rule when relevant and proportional to the needs of the case. Framing intelligent requests for electronically stored information, for example, may require detailed information about another party's information systems and other information resources.

The amendment deletes the former provision authorizing the court, for good cause, to order discovery of any matter relevant to the subject matter involved in the action. The Committee has been informed that this language is rarely invoked. Proportional discovery relevant to any party's claim or defense suffices, given a proper understanding of what is relevant to a claim or defense. The distinction between matter relevant to a claim or defense and matter relevant to the subject matter was introduced in 2000. The 2000 Note offered three examples of information that, suitably focused, would be relevant to the parties' claims or defenses. The examples were "other incidents of the same type, or involving the same product"; "information about organizational arrangements or filing systems"; and "information that could be used to impeach a likely witness." Such discovery is not foreclosed by the amendments. Discovery that is relevant to the parties' claims or defenses may also support amendment of the pleadings to add a new claim or defense that affects the scope of discovery.

The former provision for discovery of relevant but inadmissible information that appears "reasonably calculated to lead to the discovery of admissible evidence" is also deleted. The phrase has been used by some, incorrectly, to define the scope of discovery. As the Committee Note to the 2000 amendments observed, use of the "reasonably calculated" phrase to define the scope of discovery "might swallow any other limitation on the scope of discovery." The 2000 amendments sought to prevent such misuse by adding the word "Relevant" at the beginning of the sentence, making clear that "'relevant' means within the scope of discovery as defined in this subdivision . . . ." The "reasonably calculated" phrase has continued to create problems, however, and is removed by these amendments. It is replaced by the direct statement that "Information within this scope of discovery need not be admissible in

evidence to be discoverable." Discovery of nonprivileged information not admissible in evidence remains available so long as it is otherwise within the scope of discovery.

Rule 26(b)(2)(C)(iii) is amended to reflect the transfer of the considerations that bear on proportionality to Rule 26(b)(1). The court still must limit the frequency or extent of proposed discovery, on motion or on its own, if it is outside the scope permitted by Rule 26(b)(1).

Rule 26(c)(1)(B) is amended to include an express recognition of protective orders that allocate expenses for disclosure or discovery. Authority to enter such orders is included in the present rule, and courts already exercise this authority. Explicit recognition will forestall the temptation some parties may feel to contest this authority. Recognizing the authority does not imply that cost-shifting should become a common practice. Courts and parties should continue to assume that a responding party ordinarily bears the costs of responding.

Rule 26(d)(2) is added to allow a party to deliver Rule 34 requests to another party more than 21 days after that party has been served even though the parties have not yet had a required Rule 26(f) conference. Delivery may be made by any party to the party that has been served, and by that party to any plaintiff and any other party that has been served. Delivery does not count as service; the requests are considered to be served at the first Rule 26(f) conference. Under Rule 34(b)(2)(A) the time to respond runs from service. This relaxation of the discovery moratorium is designed to facilitate focused discussion during the Rule 26(f) conference. Discussion at the conference may produce changes in the requests. The opportunity for advance scrutiny of requests delivered before the Rule 26(f) conference should not affect a decision whether to allow additional time to respond.

Rule 26(d)(3) is renumbered and amended to recognize that the parties may stipulate to case-specific sequences of discovery.

Rule 26(f)(3) is amended in parallel with Rule 16(b)(3) to add two items to the discovery plan — issues about preserving electronically stored information and court orders under Evidence Rule 502.

## Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes

### *2015 Committee Note*

Several amendments are made in Rule 34, aimed at reducing the potential to impose unreasonable burdens by objections to requests to produce.

Rule 34(b)(2)(A) is amended to fit with new Rule 26(d)(2). The time to respond to a Rule 34 request delivered before the parties' Rule 26(f) conference is 30 days after the first Rule 26(f) conference.

Rule 34(b)(2)(B) is amended to require that objections to Rule 34 requests be stated with specificity. This provision adopts the language of Rule 33(b)(4), eliminating any doubt that less specific objections might be suitable under Rule 34. The specificity of the objection ties to the new provision in Rule 34(b)(2)(C) directing that an objection must state whether any responsive materials are being withheld on the basis of that objection. An objection may state that a request is overbroad, but if the objection recognizes that some part of the request is appropriate the objection should state the scope that is not overbroad. Examples would be a statement that the responding party will limit the search to documents or electronically stored information created within a given period of time prior to the events in suit, or to specified sources. When there is such an objection, the statement of what has been withheld can properly identify as matters "withheld" anything beyond the scope of the search specified in the objection.

Rule 34(b)(2)(B) is further amended to reflect the common practice of producing copies of documents or electronically stored information rather than simply permitting inspection. The response to the request must state that copies will be produced. The production must be completed either by the time for inspection specified in the request or by another reasonable time specifically identified in the response. When it is necessary to make the production in stages the response should specify the beginning and end dates of the production.

Rule 34(b)(2)(C) is amended to provide that an objection to a Rule 34 request must state whether anything is being withheld on the basis of the objection. This amendment should end the confusion that frequently arises when a producing party states several objections and still produces information, leaving the requesting party uncertain whether any relevant and responsive information has been withheld on the basis of the objections. The producing party does not need to provide a detailed description or log of all documents withheld, but does need to alert other parties to the fact that documents have been withheld and thereby facilitate an informed discussion of the objection. An objection that states the limits that have controlled the search for responsive and relevant materials qualifies as a statement that the materials have been "withheld."

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

### *2015 Committee Note*

Subdivision (a). Rule 37(a)(3)(B)(iv) is amended to reflect the common practice of producing copies of documents or electronically stored information rather than simply

permitting inspection. This change brings item (iv) into line with paragraph (B), which provides a motion for an order compelling "production, or inspection."

Subdivision (e). Present Rule 37(e), adopted in 2006, provides: "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." This limited rule has not adequately addressed the serious problems resulting from the continued exponential growth in the volume of such information. Federal circuits have established significantly different standards for imposing sanctions or curative measures on parties who fail to preserve electronically stored information. These developments have caused litigants to expend excessive effort and money on preservation in order to avoid the risk of severe sanctions if a court finds they did not do enough.

New Rule 37(e) replaces the 2006 rule. It authorizes and specifies measures a court may employ if information that should have been preserved is lost, and specifies the findings necessary to justify these measures. It therefore forecloses reliance on inherent authority or state law to determine when certain measures should be used. The rule does not affect the validity of an independent tort claim for spoliation if state law applies in a case and authorizes the claim.

The new rule applies only to electronically stored information, also the focus of the 2006 rule. It applies only when such information is lost. Because electronically stored information often exists in multiple locations, loss from one source may often be harmless when substitute information can be found elsewhere.

The new rule applies only if the lost information should have been preserved in the anticipation or conduct of litigation and the party failed to take reasonable steps to preserve it. Many court decisions hold that potential litigants have a duty to preserve relevant information when litigation is reasonably foreseeable. Rule 37(e) is based on this common-law duty; it does not attempt to create a new duty to preserve. The rule does not apply when information is lost before a duty to preserve arises.

In applying the rule, a court may need to decide whether and when a duty to preserve arose. Courts should consider the extent to which a party was on notice that litigation was likely and that the information would be relevant. A variety of events may alert a party to the prospect of litigation. Often these events provide only limited information about that prospective litigation, however, so that the scope of information that should be preserved may remain uncertain. It is important not to be blinded to this reality by hindsight arising from familiarity with an action as it is actually filed.

Although the rule focuses on the common-law obligation to preserve in the anticipation or conduct of litigation, courts may sometimes consider whether there was an independent requirement that the lost information be preserved. Such requirements arise from many sources — statutes, administrative regulations, an order in another

case, or a party's own information-retention protocols. The court should be sensitive, however, to the fact that such independent preservation requirements may be addressed to a wide variety of concerns unrelated to the current litigation. The fact that a party had an independent obligation to preserve information does not necessarily mean that it had such a duty with respect to the litigation, and the fact that the party failed to observe some other preservation obligation does not itself prove that its efforts to preserve were not reasonable with respect to a particular case.

The duty to preserve may in some instances be triggered or clarified by a court order in the case. Preservation orders may become more common, in part because Rules 16(b)(3)(B)(iii) and 26(f)(3)(C) are amended to encourage discovery plans and orders that address preservation. Once litigation has commenced, if the parties cannot reach agreement about preservation issues, promptly seeking judicial guidance about the extent of reasonable preservation may be important. The rule applies only if the information was lost because the party failed to take reasonable steps to preserve the information. Due to the ever-increasing volume of electronically stored information and the multitude of devices that generate such information, perfection in preserving all relevant electronically stored information is often impossible. As under the current rule, the routine, good-faith operation of an electronic information system would be a relevant factor for the court to consider in evaluating whether a party failed to take reasonable steps to preserve lost information, although the prospect of litigation may call for reasonable steps to preserve information by intervening in that routine operation. This rule recognizes that "reasonable steps" to preserve suffice; it does not call for perfection. The court should be sensitive to the party's sophistication with regard to litigation in evaluating preservation efforts; some litigants, particularly individual litigants, may be less familiar with preservation obligations than others who have considerable experience in litigation.

Because the rule calls only for reasonable steps to preserve, it is inapplicable when the loss of information occurs despite the party's reasonable steps to preserve. For example, the information may not be in the party's control. Or information the party has preserved may be destroyed by events outside the party's control — the computer room may be flooded, a "cloud" service may fail, a malign software attack may disrupt a storage system, and so on. Courts may, however, need to assess the extent to which a party knew of and protected against such risks. Another factor in evaluating the reasonableness of preservation efforts is proportionality. The court should be sensitive to party resources; aggressive preservation efforts can be extremely costly, and parties (including governmental parties) may have limited staff and resources to devote to those efforts. A party may act reasonably by choosing a less costly form of information preservation, if it is substantially as effective as more costly forms. It is important that counsel become familiar with their clients' information systems and digital data — including social media — to address these issues. A party urging that preservation requests are disproportionate may need to provide specifics about these matters in order to enable meaningful discussion of the appropriate preservation regime.

When a party fails to take reasonable steps to preserve electronically stored information that should have been preserved in the anticipation or conduct of litigation, and the information is lost as a result, Rule 37(e) directs that the initial focus should be on whether the lost information can be restored or replaced through additional discovery. Nothing in the rule limits the court's powers under Rules 16 and 26 to authorize additional discovery. Orders under Rule 26(b)(2)(B) regarding discovery from sources that would ordinarily be considered inaccessible or under Rule 26(c)(1)(B) on allocation of expenses may be pertinent to solving such problems. If the information is restored or replaced, no further measures should be taken. At the same time, it is important to emphasize that efforts to restore or replace lost information through discovery should be proportional to the apparent importance of the lost information to claims or defenses in the litigation. For example, substantial measures should not be employed to restore or replace information that is marginally relevant or duplicative.

Subdivision (e)(1). This subdivision applies only if information should have been preserved in the anticipation or conduct of litigation, a party failed to take reasonable steps to preserve the information, information was lost as a result, and the information could not be restored or replaced by additional discovery. In addition, a court may resort to (e)(1) measures only "upon finding prejudice to another party from loss of the information." An evaluation of prejudice from the loss of information necessarily includes an evaluation of the information's importance in the litigation.

The rule does not place a burden of proving or disproving prejudice on one party or the other. 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. In other situations, however, the content of the lost information may be fairly evident, the information may appear to be unimportant, or the abundance of preserved information may appear sufficient to meet the needs of all parties. Requiring the party seeking curative measures to prove prejudice may be reasonable in such situations. The rule leaves judges with discretion to determine how best to assess prejudice in particular cases. Once a finding of prejudice is made, the court is authorized to employ measures "no greater than necessary to cure the prejudice." The range of such measures is quite broad if they are necessary for this purpose. There is no all-purpose hierarchy of the severity of various measures; the severity of given measures must be calibrated in terms of their effect on the particular case. But authority to order measures no greater than necessary to cure prejudice does not require the court to adopt measures to cure every possible prejudicial effect. Much is entrusted to the court's discretion.

In an appropriate case, it may be that serious measures are necessary to cure prejudice found by the court, such as forbidding the party that failed to preserve information from putting on certain evidence, permitting the parties to present evidence and argument to the jury regarding the loss of information, or giving the jury instructions to assist in its evaluation of such evidence or argument, other than instructions to which subdivision (e)(2) applies. Care must be taken, however, to ensure that curative

measures under subdivision (e)(1) do not have the effect of measures that are permitted under subdivision (e)(2) only on a finding of intent to deprive another party of the lost information's use in the litigation. An example of an inappropriate (e)(1) measure might be an order striking pleadings related to, or precluding a party from offering any evidence in support of, the central or only claim or defense in the case. On the other hand, it may be appropriate to exclude a specific item of evidence to offset prejudice caused by failure to preserve other evidence that might contradict the excluded item of evidence.

Subdivision (e)(2). This subdivision authorizes courts to use specified and very severe measures to address or deter failures to preserve electronically stored information, but only on finding that the party that lost the information acted with the intent to deprive another party of the information's use in the litigation. It is designed to provide a uniform standard in federal court for use of these serious measures when addressing failure to preserve electronically stored information. It rejects cases such as *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002), that authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence.

Adverse-inference instructions were developed on the premise that a party's intentional loss or destruction of evidence to prevent its use in litigation gives rise to a reasonable inference that the evidence was unfavorable to the party responsible for loss or destruction of the evidence. Negligent or even grossly negligent behavior does not logically support that inference. Information lost through negligence may have been favorable to either party, including the party that lost it, and inferring that it was unfavorable to that party may tip the balance at trial in ways the lost information never would have. The better rule for the negligent or grossly negligent loss of electronically stored information is to preserve a broad range of measures to cure prejudice caused by its loss, but to limit the most severe measures to instances of intentional loss or destruction. Similar reasons apply to limiting the court's authority to presume or infer that the lost information was unfavorable to the party who lost it when ruling on a pretrial motion or presiding at a bench trial. Subdivision (e)(2) limits the ability of courts to draw adverse inferences based on the loss of information in these circumstances, permitting them only when a court finds that the information was lost with the intent to prevent its use in litigation.

Subdivision (e)(2) applies to jury instructions that permit or require the jury to presume or infer that lost information was unfavorable to the party that lost it. Thus, it covers any instruction that directs or permits the jury to infer from the loss of information that it was in fact unfavorable to the party that lost it. The subdivision does not apply to jury instructions that do not involve such an inference. For example, subdivision (e)(2) would not prohibit a court from allowing the parties to present evidence to the jury concerning the loss and likely relevance of information and instructing the jury that it may consider that evidence, along with all the other evidence in the case, in making its decision. These measures, which would not involve instructing a jury it may draw an adverse inference from loss of information,

would be available under subdivision (e)(1) if no greater than necessary to cure prejudice. In addition, subdivision (e)(2) does not limit the discretion of courts to give traditional missing evidence instructions based on a party's failure to present evidence it has in its possession at the time of trial.

Subdivision (e)(2) requires a finding that the party acted with the intent to deprive another party of the information's use in the litigation. This finding may be made by the court when ruling on a pretrial motion, when presiding at a bench trial, or when deciding whether to give an adverse inference instruction at trial. If a court were to conclude that the intent finding should be made by a jury, the court's instruction should make clear that the jury may infer from the loss of the information that it was unfavorable to the party that lost it only if the jury first finds that the party acted with the intent to deprive another party of the information's use in the litigation. If the jury does not make this finding, it may not infer from the loss that the information was unfavorable to the party that lost it.

Subdivision (e)(2) does not include a requirement that the court find prejudice to the party deprived of the information. This is because the finding of intent required by the subdivision can support not only an inference that the lost information was unfavorable to the party that intentionally destroyed it, but also an inference that the opposing party was prejudiced by the loss of information that would have favored its position. Subdivision (e)(2) does not require any further finding of prejudice.

Courts should exercise caution, however, in using the measures specified in (e)(2). Finding an intent to deprive another party of the lost information's use in the litigation does not require a court to adopt any of the measures listed in subdivision (e)(2). The remedy should fit the wrong, and the severe measures authorized by this subdivision should not be used when the information lost was relatively unimportant or lesser measures such as those specified in subdivision (e)(1) would be sufficient to redress the loss.