

**GETTING SERIOUS: WHY COMPANIES MUST ADOPT
INFORMATION GOVERNANCE MEASURES TO PREPARE FOR
THE UPCOMING CHANGES TO THE FEDERAL RULES OF CIVIL
PROCEDURE**

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“[W]ithout a corresponding change in discovery culture by courts, counsel and clients alike, the proposed rules modifications will likely have little to no effect on the manner in which discovery is conducted today.”¹

I. INTRODUCTION

[1] It has been over seven years now since the so-called e-Discovery amendments to the Federal Rules of Civil Procedure (“Federal Rules,”

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¹ Mitchell Dembin & Philip Favro, *Changing Discovery Culture One Step at a Time*, LAW TECH. NEWS (Dec. 5, 2013), <http://www.lawtechnologynews.com/id=1202630168239/Changing-Discovery-Culture-One-Step-at-a-Time?slreturn=20140126202727> (describing the steps organizations can take to satisfy the provisions set forth in the newly proposed amendments to the Federal Rules of Civil Procedure).

“Rules,” or individually, “Rule”) went into effect.² When they were implemented, various commentators reasoned those amendments would facilitate a more efficient and cost-effective resolution of discovery issues.³ This, in turn, would free parties to focus on the merits of claims and defenses, “teeing matters up for disposition through settlement, summary judgment, or trial.”⁴ The reality, of course, is far from this Pollyannaish vision. Instead of simplifying the process, the 2006 amendments seem to have generated more satellite litigation than ever before about preservation and production issues.⁵

² See U.S. Supreme Court Order Amending the Fed. R. Civ. P. at 3, Apr. 12, 2006, available at <http://www.supremecourt.gov/orders/courtorders/frcv06p.pdf>; see also Philip J. Favro, *A New Frontier in Electronic Discovery: Preserving and Obtaining Metadata*, 13 B.U. J. SCI. & TECH. L. 1, 18 n.114 (2007).

³ See JUDICIAL CONFERENCE COMM. ON RULES OF PRACTICE AND PROCEDURE, SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE COMM. ON RULES OF PRACTICE AND PROCEDURE 24 (Sep. 2005), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2005.pdf>; see also Jessica DeBono, Comment, *Preventing and Reducing Costs and Burdens Associated with E-discovery: The 2006 Amendments to the Federal Rules of Civil Procedure*, 59 MERCER L. REV. 963, 964 (2008) (explaining that “the 2006 amendments are intended to help reduce the costs and burdens imposed by electronic discovery”).

⁴ Philip J. Favro & Hon. Derek P. Pullan, *New Utah Rule 26: A Blueprint for Proportionality under the Federal Rules of Civil Procedure*, 2012 MICH. ST. L. REV. 933, 979 (2012); see also Milberg LLP & Hausfeld LLP, *E-Discovery Today: The Fault Lies Not in Our Rules . . .*, 4 FED. CTS. L. REV. 131, 142 (2011) (arguing that the 2006 Rules amendments “place a premium on a fair resolution on the merits” and deter lawyers from using discovery “as an opportunity to hide the ball until trial”).

⁵ See Philip Favro & Tish Looper, *The Rule 37(e) Safe Harbor: The Touchstone of Effective Information Management*, METROPOLITAN CORP. COUNS., December 2011, at 12; Dan H. Willoughby, Jr. et al., *Sanctions for E-Discovery Violations: By the Numbers*, 60 DUKE L.J. 789, 792-95 (2010) (observing that the “highest number of filed motions and awards relating to e-[D]iscovery sanctions in any single year prior to 2010 occurred in 2009, three years after the effective date of the 2006 amendments”).

[2] Beyond the issues spawned by the 2006 amendments, the costs and complexity of discovery are increasing due to digital age advances that have caused information to proliferate exponentially.⁶ For example, mobile devices such as smartphones and tablet computers have provided users with new methods that facilitate a more rapid and user-friendly exchange of information.⁷ Users now share that information with increasing frequency through short message service and social networks.⁸ Because users do so in far greater quantities than they did with e-mail, the number of communications potentially subject to discovery has been substantially augmented.⁹ Moreover, users have an unlimited virtual

⁶ See COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., 113TH CONG., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY AND CIVIL PROCEDURE 271 (Comm. Print 2013), available at <http://www.uscourts.gov/uscourts/rules/preliminary-draft-proposed-amendments.pdf> [hereinafter REPORT] (observing that “[t]he amount and variety of digital information has expanded enormously in the last decade, and the costs and burdens of litigation holds have escalated as well”).

⁷ See generally Tom Kaneshige, *Infographic: BYOD’s Meteoric Rise*, CIO (Jan. 16, 2013, 2:50 PM), <http://blogs.cio.com/consumer-it/17707/infographic-byods-meteoric-rise> (noting the substantial growth of personal mobile device use in the workplace).

⁸ See Gabriella Khorasanee, *The Growing Reach of e-Discovery: Text Messages*, IN-HOUSE (Oct. 14, 2013, 11:52 AM), http://blogs.findlaw.com/in_house/2013/10/the-growing-reach-of-e-discovery-text-messages.html (discussing survey results regarding cellphone use for text messaging, along with associated e-Discovery risks arising from text messaging).

⁹ Cf. William D. Henderson, *A Blueprint for Change*, 40 PEPP. L. REV. 461, 487 (2013) (observing that discovery burdens have increased due to the “massive explosion of digital data,” which includes “e[-]mails, text messages, internal knowledge management platforms designed to replace e[-]mail, and digitized voice mail”).

warehouse in which to store those conversations due to the popularity of low cost cloud computing services.¹⁰

[3] Given these factors and the challenges they present to the discovery process, there should be little doubt as to why the Judicial Conference Advisory Committee on the Civil Rules (“Committee”) has proposed another round of Rules amendments.¹¹ The draft amendments are generally designed to streamline the federal discovery process, encourage cooperative advocacy among litigants, and eliminate gamesmanship.¹² The proposed changes also tackle the continuing problems associated with the preservation of electronically stored information (“ESI”).¹³ As a result of its efforts, the Committee has produced a package of amendments that could affect many aspects of federal discovery practice.¹⁴

¹⁰ See generally William Jeremy Robison, Note, *Free at What Cost?: Cloud Computing Privacy Under the Stored Communications Act*, 98 GEO. L.J. 1195, 1200 n.26, 1202-04 (2010) (defining cloud computing and describing its rapidly expanding usage).

¹¹ See generally Craig B. Shaffer & Ryan T. Shaffer, *Looking Past The Debate: Proposed Revisions to the Federal Rules of Civil Procedure*, 7 FED. CTS. L. REV. 178, 187-90 (2013) (describing generally the factors driving the demand for additional amendments to the Federal Rules); REPORT, *supra* note 6, at 259-339.

¹² See REPORT, *supra* note 6, at 1, 260, 270.

¹³ See *id.* at 272, 274.

¹⁴ See Shaffer & Shaffer, *supra* note 11, at 178-79. See generally REPORT, *supra* note 6, at 259-339.

[4] To date, most of the debate on the proposals has focused on the draft amendment to Rule 37(e).¹⁵ That amendment would raise the standard of culpability required to impose sanctions for any failure to preserve relevant information.¹⁶ Such attention is understandable given the proposal's likely impact on organizations' defensible deletion efforts.¹⁷ Nevertheless, there are several other noteworthy changes that are no less important for litigants and lawyers.¹⁸ Among these are the amendments that would usher in a new era of adversarial cooperation, proportionality standards, and active judicial case management.¹⁹ The collective impact of these proposals could result in decreased burdens and costs for courts, clients, and counsel alike.²⁰

¹⁵ See, e.g., Thomas Y. Allman, *Rules Committee Adopts 'Package' of Discovery Amendments*, 13 DIGITAL DISCOVERY AND E-EVIDENCE 200 (2013), <http://www.bloomberglaw.com/document/X4ST0CC4000000>

¹⁶ See REPORT, *supra* note 6, at 272 (“[T]he amended rule [37(e)] makes it clear that—in all but very exceptional cases in which failure to preserve ‘irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation’—sanctions (as opposed to curative measures) could be employed only if the court finds that the failure to preserve was willful or in bad faith, and that it caused substantial prejudice in the litigation.” (quoting the proposed Rule 37(e)(1)(B)(ii))).

¹⁷ See Michael Kozubek, *Proposed Federal Rule Changes Would Limit the Scope of e-discovery*, INSIDE COUNSEL (July 1, 2013), <http://www.insidecounsel.com/2013/07/01/proposed-federal-rule-changes-would-limit-the-scop>.

¹⁸ See REPORT, *supra* note 6, at 260.

¹⁹ See *id.*

²⁰ See Alison Frankel, *Debate Sharpens on Proposed Changes to Federal Rules on Discovery*, REUTERS (Nov. 6, 2013), <http://blogs.reuters.com/alison-frankel/2013/11/06/debate-sharpens-on-proposed-changes-to-federal-rules-on-discovery/>.

[5] For organizations to meet the challenges these proposed changes pose, they will need to take actionable measures to satisfy those provisions.²¹ Such measures generally fall under the umbrella of an enterprise's information governance plan.²² For many companies, information governance remains an elusive concept.²³ Nevertheless, an intelligent information governance plan offers a more enlightened approach for companies to comply with the proposed Rules changes.²⁴ Moreover, it is perhaps the only way for clients to realistically reduce the costs and burdens of discovery.²⁵

[6] In this Article, I will consider these subjects. In Part II, I provide an overview of the newly proposed amendments and discuss the impact the Rules proposals will likely have on organizations. In Part III, I offer five practical suggestions that, if followed, will help enterprises meet the information governance challenges posed by the proposed Rules amendments.

II. THE NEWLY PROPOSED AMENDMENTS

[7] The overall thrust of the Committee's proposed amendments is to facilitate the tripartite aims of Federal Rule 1 in the discovery process.²⁶

²¹ Cf. Hon. Patrick J. Walsh, *Rethinking Civil Litigation in Federal District Court*, 40 LITIG. 6, 7 (2013) (urging lawyers to use "[twenty-first] century computer technology" to address digital age discovery issues instead of relying on legacy discovery technologies).

²² See Dembin & Favro, *supra* note 1.

²³ See *id.*

²⁴ See *id.*

²⁵ See *id.*

²⁶ See REPORT, *supra* note 6, at 260-61, 264, 269-70.

To carry out Rule 1’s lofty yet important mandate of securing “the just, speedy, and inexpensive determination” of litigation,²⁷ the Committee has proposed several modifications to advance the notions of cooperation and proportionality.²⁸ Other changes focus on improving “early and effective judicial case management.”²⁹ In addition, the Committee has proposed revising Federal Rule 37(e) in an attempt to create a uniform national standard for discovery sanctions stemming from failures to preserve evidence.³⁰ The draft amendments that address these concepts are each considered in turn. I will then conclude this Part by generally discussing the effects the Rules changes will likely have on organizations.

A. Cooperation—Rule 1

[8] To better emphasize the need for adversarial cooperation in discovery, the Committee has recommended that Rule 1 be amended to specify that clients share the responsibility with the court for achieving the Rule’s objectives.³¹ The proposed revisions to the Rule (in italics with deletions in strikethrough) read in pertinent part as follows: “[These rules] should be construed, ~~and~~ administered, *and employed by the court and the*

²⁷ FED. R. CIV. P. 1.

²⁸ See REPORT, *supra* note 6, at 260-61, 264, 269-70 (observing that “[p]roportionality in discovery, cooperation among lawyers, and early and active judicial case management are highly valued and, at times, missing in action,” and discussing how the proposed amendments would advance these notions).

²⁹ *Id.* at 260.

³⁰ See *id.* at 272 (“A central objective of the proposed new Rule 37(e) is to replace the disparate treatment of preservation/sanctions issues in different circuits by adopting a single standard.”).

³¹ See *id.* at 270.

parties to secure the just, speedy, and inexpensive determination of every action and proceeding.”³²

[9] Even though this concept was already set forth in the Advisory Committee Notes to Rule 1, the Committee felt that an express reference in the Rule itself would prompt litigants and their lawyers to engage in more cooperative conduct.³³ Perhaps more importantly, this mandate should also enable judges “to elicit better cooperation when the lawyers and parties fall short.”³⁴ Indeed, such a reference, when coupled with the “stop and think” certification requirement from Federal Rule 26(g), should give jurists more than enough procedural basis to remind counsel and clients of their duty to conduct discovery in a cooperative and cost effective manner.³⁵

B. Proportionality—Rules 26, 30, 31, 33, 34, 36

[10] The logical corollary to cooperation in discovery is proportionality.³⁶ Proportionality standards, which require that the

³² *Id.* at 281.

³³ *See* REPORT, *supra* note 6, at 270, 281.

³⁴ *Id.* at 270.

³⁵ *See* *Bottoms v. Liberty Life Assurance Co. of Bos.*, No. 11-cv-01606-PAB-CBS, 2011 U.S. Dist. LEXIS 143251, at *10-11 (D. Colo. Dec. 13, 2011) (spotlighting the importance of the Rule 26(g) certification requirement, along with sanctions for noncompliance, for curbing discovery abuses).

³⁶ *See, e.g., Pippins v. KPMG LLP*, No. 11 Civ. 0377(CM)(JLC), 2011 U.S. Dist. LEXIS 116427, at *23-27 (S.D.N.Y. Oct. 7, 2011), *aff'd*, 279 F.R.D. 245 (S.D.N.Y. 2012) (discussing generally why cooperation and proportionality are inextricably intertwined for purposes of discovery).

benefits of discovery be commensurate with its burdens, have been extant in the Federal Rules since 1983.³⁷ Nevertheless, they have been invoked too infrequently over the past thirty years to address the problems of over-discovery and gamesmanship that permeate the discovery process.³⁸ In an effort to spotlight this “highly valued” yet “missing in action” doctrine,³⁹ the Committee has proposed numerous changes to the current Rules regime.⁴⁰ The most significant changes are found in Rules 26(b)(1) and 34(b).⁴¹

1. Rule 26(b)(1)—Tightening the Scope of Permissible Discovery

[11] The Committee has proposed that the permissible scope of discovery under Rule 26(b)(1) be modified to spotlight the limitations proportionality imposes on discovery.⁴² Those limitations are presently found in Rule 26(b)(2)(C) and are not readily apparent to many lawyers or judges.⁴³ Rule 26(b)(2)(C) provides that discovery must be limited where requests are unreasonably cumulative or duplicative, the discovery can be

³⁷ See REPORT, *supra* note 6, at 264-65.

³⁸ Cf. Favro & Pullan, *supra* note 4, at 966-968 (proposing modest changes to the Federal Rules to better emphasize that proportionality standards are the touchstone of federal discovery).

³⁹ REPORT, *supra* note 6, at 260.

⁴⁰ See *id.* at 264-67, 269.

⁴¹ See *id.* at 264-67.

⁴² See *id.* at 265, 296.

⁴³ See *id.* at 296; Favro & Pullan, *supra* note 4, at 966.

obtained from an alternative source that is less expensive or burdensome, or the burden or expense of the discovery outweighs its benefit.⁴⁴ The proposed modification (in italics) would address this problem by placing them in Rule 26(b)(1) and by more clearly conditioning the permissible scope of discovery on proportionality standards:

Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense *and proportional to the needs of the case, considering the amount in controversy, the importance of the issues at stake in the action, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.*⁴⁵

By moving the proportionality rule directly into the scope of discovery, counsel and the courts may gain a better understanding of the restraints this concept places on discovery.⁴⁶

[12] Rule 26(b)(1) has additionally been modified to enforce the notion that discovery is confined to those matters that are relevant to the claims or defenses at issue in a particular case.⁴⁷ Even though discovery has been limited in this regard for many years, the Committee felt this limitation was being swallowed by the "reasonably calculated" provision in Rule

⁴⁴ FED. R. CIV. P. 26(b)(2)(C).

⁴⁵ REPORT, *supra* note 6, at 289.

⁴⁶ See Favro & Pullan, *supra* note 4, at 966, 976.

⁴⁷ See REPORT, *supra* note 6, at 296-97.

26(b)(1).⁴⁸ That provision currently provides for the discovery of relevant evidence that is inadmissible so long as it is “reasonably calculated to lead to the discovery of admissible evidence.”⁴⁹ Despite the narrow purpose of this provision, the Committee found many judges and lawyers unwittingly extrapolated the “reasonably calculated” wording to broaden discovery beyond the benchmark of relevance.⁵⁰ To disabuse courts and counsel of this practice, the “reasonably calculated” phrase has been removed and replaced with the following sentence: “Information within this scope of discovery need not be admissible in evidence to be discoverable.”⁵¹

[13] Similarly, the Committee has recommended eliminating the provision in Rule 26(b)(1) which presently allows the court—on a showing of good cause—to order “discovery of any matter relevant to the subject matter involved in the action.”⁵² In its proposed “Committee Note,” the Committee justified this excision by reiterating its mantra about the proper scope of discovery: “Proportional discovery relevant to any party’s claim or defense suffices.”⁵³

⁴⁸ *Id.* at 266.

⁴⁹ FED. R. CIV. P. 26(b)(1).

⁵⁰ *See* REPORT, *supra* note 6, at 266.

⁵¹ *Id.* at 289-90.

⁵² *Id.* at 265-66, 296-97.

⁵³ *Id.* at 296-297.

2. Rule 34(b)—Eliminating Gamesmanship with Document Productions

[14] The three key modifications the Committee has proposed for Rule 34 are designed to eliminate some of the gamesmanship associated with written discovery responses.⁵⁴ The first change is a requirement in Rule 34(b)(2)(B) that any objection made in response to a document request must be stated “with specificity.”⁵⁵ This recommended change is supposed to do away with the assertion of general objections.⁵⁶ While such objections have almost universally been rejected in federal discovery practice, they still appear in Rule 34 responses.⁵⁷ By including an explicit requirement for specific objections and coupling it with the threat of sanctions for non-compliance under Rule 26(g), the Committee may finally eradicate this practice from discovery.⁵⁸

[15] The second change is calculated to address another longstanding discovery dodge: making a party’s response “subject to” a particular set of objections.⁵⁹ Whether those objections are specific or general, the Committee concluded that such a conditional response leaves the party who requested the materials unsure as to whether anything was withheld and, if so, on what grounds.⁶⁰ To remedy this practice, the Committee

⁵⁴ *See id.* at 269.

⁵⁵ REPORT, *supra* note 6, at 269, 307-08.

⁵⁶ *See id.* at 308.

⁵⁷ *See, e.g.,* *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 359 (D. Md. 2008).

⁵⁸ *See* FED. R. CIV. P. 26(g)(3).

⁵⁹ *See* REPORT, *supra* note 6, at 269.

⁶⁰ *See id.* at 269, 309.

added the following provision to Rule 34(b)(2)(C): “An objection must state whether any responsive materials are being withheld on the basis of that objection.”⁶¹ If enforced, such a requirement could make Rule 34 responses more straightforward and less evasive.⁶² This, in turn, would obviate needless meet-and-confer efforts and motion practice undertaken to ferret out such information.⁶³

[16] The third change is intended to clarify the uncertainty surrounding the responding party’s timeframe for producing documents.⁶⁴ As it now stands, Rule 34 does not expressly mandate when the responding party must complete its production of documents.⁶⁵ That omission has led to delayed and open-ended productions, which can lengthen the discovery process and increase litigation expenses.⁶⁶ To correct this oversight, the Committee proposed that the responding party complete its production “no later than the time for inspection stated in the request or [at] a later reasonable time stated in the response.”⁶⁷ For so-called “rolling productions,” the responding party “should specify the beginning and end dates of the production.”⁶⁸ Such a provision should ultimately provide

⁶¹ *Id.* at 308.

⁶² *See id.* at 269, 309.

⁶³ *See id.*

⁶⁴ *See* REPORT, *supra* note 6 at 269.

⁶⁵ *See id.*

⁶⁶ *See id.*

⁶⁷ *Id.* at 269, 307.

⁶⁸ *Id.* at 269, 309.

greater clarity and increased understanding surrounding productions of ESI.⁶⁹

3. Other Changes—Cost Shifting in Rule 26(c), Reductions in Discovery under Rules 30, 31, 33, 36

[17] There were several additional changes the Committee recommended that are grounded in the concept of proportionality. The new cost shifting provision in Rule 26(c) is particularly noteworthy.⁷⁰ While several courts have implied cost-shifting authority presently exists in Rule 26(c) and have issued orders accordingly, the proposed changes would eliminate any ambiguity on this issue.⁷¹ Courts would be expressly authorized to allocate the expenses of discovery among the parties.⁷²

[18] The Committee has also suggested reductions in the number of depositions, interrogatories, and requests for admission.⁷³ Under the draft amendments, the number of depositions would be reduced from ten to five.⁷⁴ Oral deposition time would also be cut from seven hours to six.⁷⁵ As for written discovery, the number of interrogatories would decrease from twenty-five to fifteen and a numerical limit of twenty-five would be

⁶⁹ See REPORT, *supra* note 6, at 269.

⁷⁰ See generally *id.* at 266, 298.

⁷¹ See *id.*

⁷² See *id.*

⁷³ See *id.* at 267-69.

⁷⁴ See REPORT, *supra* note 6, at 267.

⁷⁵ *Id.* at 301.

introduced for requests for admission.⁷⁶ That limit of twenty-five, however, would not apply to requests that seek to ascertain the genuineness of a particular document.⁷⁷

C. Case Management—Rules 4, 16, 26, 34

[19] To better ensure that its objectives regarding cooperation and proportionality are achieved, the Committee has introduced several Rules changes that would augment the level of judicial involvement in case management.⁷⁸ Most of these changes are designed to improve the effectiveness of the Rule 26(f) discovery conference, to encourage courts to provide input on key discovery issues at the outset of a case, and to expedite the commencement of discovery.⁷⁹

1. Rules 26 and 34—Improving the Effectiveness of the Rule 26(f) Discovery Conference

[20] One way the Committee felt it could enable greater judicial involvement in case management was to require the parties to flesh out specific issues in the Rule 26(f) conference.⁸⁰ The renewed emphasis on conducting a meaningful Rule 26(f) conference is significant as courts

⁷⁶ See *id.* at 268-69, 305.

⁷⁷ See *id.* at 269.

⁷⁸ See *id.* at 260-61.

⁷⁹ See REPORT, *supra* note 6, at 261.

⁸⁰ See *id.* at 263.

generally believe that a successful conference is the lynchpin for conducting discovery in a proportional manner.⁸¹

[21] To enhance the usefulness of the conference, the Committee recommended amending Rule 26(f) to specifically require the parties to discuss any pertinent issues surrounding the preservation of ESI.⁸² This provision is calculated to get the parties thinking proactively about preservation problems that could arise later in discovery.⁸³ It is also designed to work in conjunction with the proposed amendments to Rule 16(b)(3) and Rule 37(e).⁸⁴ Changes to the former would expressly empower the court to issue a scheduling order addressing ESI preservation issues.⁸⁵ Under the latter, the extent to which preservation issues were addressed at a discovery conference or in a scheduling order could very well affect any subsequent motion for sanctions for failure to preserve relevant ESI.⁸⁶

[22] Another amendment to Rule 26(f) would require the parties to discuss the need for a “clawback” order under Federal Rule of Evidence

⁸¹ See, e.g., SEVENTH CIRCUIT ELEC. DISCOVERY COMM., PRINCIPLES RELATING TO THE DISCOVERY OF ELECTRONICALLY STORED INFORMATION, at princ. 2.05-2.06 (2010), available at http://www.discoverypilot.com/sites/default/files/Principles8_10.pdf.

⁸² See REPORT, *supra* note 6, at 263, 295.

⁸³ See *id.* at 299.

⁸⁴ See *id.* at 263; accord *id.* at 287.

⁸⁵ See *id.* at 263.

⁸⁶ See *id.* at 299, 327-28.

502.⁸⁷ Though underused, Rule 502(d) orders generally reduce the expense and hassle of litigating over the inadvertent disclosure of ESI protected by the lawyer-client privilege.⁸⁸ To ensure this overlooked provision receives attention from litigants, the Committee has drafted a corresponding amendment to Rule 16(b)(3) that would specifically enable the court to address Rule 502(d) matters in a scheduling order.⁸⁹

[23] The final step the Committee has proposed for increasing the effectiveness of the Rule 26(f) conference is to amend Rule 26(d) and Rule 34(b)(2) to enable parties to serve Rule 34 document requests prior to that conference.⁹⁰ These “early” requests, which are not deemed served *until* the conference, are designed to “facilitate the conference by allowing consideration of actual requests, providing a focus for specific discussion.”⁹¹ This, the Committee hopes, will enable the parties to subsequently prepare Rule 34 requests that are more targeted and proportional to the issues in play.⁹²

⁸⁷ See REPORT, *supra* note 6 at 263, 296.

⁸⁸ See John M. Barkett, *Evidence Rule 502: The Solution to the Privilege-Protection Puzzle in the Digital Era*, 81 FORDHAM L. REV. 1589, 1619-20 (2013) (discussing the importance of Federal Rule of Evidence 502(d) in reducing the costs and burdens associated with attorney-client privilege reviews in discovery). See generally Richard Marcus, *The Rulemakers' Laments*, 81 FORDHAM L. REV. 1639 (2013) (describing the underuse of Federal Rule of Evidence Rule 502(d)).

⁸⁹ See REPORT, *supra* note 6, at 263, 286.

⁹⁰ See *id.* at 263-64, 294, 298, 306, 308.

⁹¹ *Id.* at 263-64.

⁹² See *id.* at 264.

2. Rule 16—Greater Judicial Input on Key Discovery Issues

[24] As mentioned above, the Committee has suggested adding provisions to Rule 16(b)(3) that track those in Rule 26(f) so as to provide the opportunity for greater judicial input on certain e-Discovery issues at the outset of a case.⁹³ In addition to these changes, Rule 16(b)(3) would also allow a court to require that the parties caucus with the court before filing a discovery motion.⁹⁴ The purpose of this provision is to encourage the disposition of these matters without the expense or delay of motion practice.⁹⁵ According to the Committee, various courts have used similar arrangements under their local rules that have “prove[n] highly effective in reducing cost and delay.”⁹⁶

3. Rules 4 and 16—Expediting the Commencement of Discovery

[25] The Committee has also recommended the time for the commencement of discovery be shortened after the filing of the complaint so as to expedite the eventual disposition of a given case.⁹⁷ In particular, Rule 4(m) would be revised to shorten time to serve the summons and complaint from 120 days to sixty days.⁹⁸ In addition, the Rule 16(b)(2)

⁹³ *See id.* at 263.

⁹⁴ *See* REPORT, *supra* note 6, at 263, 288.

⁹⁵ *See id.* at 263, 288.

⁹⁶ *Id.* at 263.

⁹⁷ *See id.* at 261, 282, 284-85, 287

⁹⁸ *Id.* at 261, 282.

amendment would reduce by thirty days the time when a court must issue a scheduling order.⁹⁹

D. Preservation and Sanctions under a Revised Federal Rule 37(e)

[26] The Committee has separately considered issues regarding the over-preservation of evidence and the appropriate standard of culpability required to impose sanctions for any failures to preserve relevant information.¹⁰⁰ Even though the current iteration of Rule 37(e) is supposed to provide guidance on these issues, amendments were deemed necessary given the inherent limitations with the Rule.¹⁰¹

[27] As it now stands, Rule 37(e) is designed to protect litigants from court sanctions when the good faith, programmed operation of their computer systems automatically destroys ESI.¹⁰² Nevertheless, the Rule has largely proved ineffective as a national standard because it does not apply to pre-litigation information destruction activities.¹⁰³ As a result, courts often used their inherent authority to bypass the Rule's protections and punish clients that negligently, though not nefariously, destroyed

⁹⁹ REPORT, *supra* note 6, at 261, 284-85.

¹⁰⁰ *See id.* at 271-72.

¹⁰¹ *See id.* at 272, 274.

¹⁰² FED. R. CIV. P. 37(e). *See generally* Philip J. Favro, *Sea Change or Status Quo: Has the Rule 37(e) Safe Harbor Advanced Best Practices for Information Management?*, 11 MINN. J.L. SCI. & TECH. 317 (2010) (discussing the background, purposes, and application of Rule 37(e)).

¹⁰³ *See* Paul W. Grimm et al., *Proportionality in the Post-Hoc Analysis of Pre-Litigation Preservation Decisions*, 37 U. BALT. L. REV. 381, 398 (2008).

documents before a lawsuit was filed.¹⁰⁴ Moreover, the Rule applied only to ESI and did not address issues surrounding the preservation of paper documents or other forms of evidence.¹⁰⁵ All of which has caused confusion among parties over what needs to be maintained for litigation, resulting in the over-preservation of information.¹⁰⁶

[28] The amendments to Rule 37(e) are designed to address these issues by “provid[ing] a uniform standard in federal court for sanctions for failure to preserve.”¹⁰⁷ They do so by removing the possibility that courts could impose the so-called doomsday sanctions from Rule 37(b)(2)(A) for either negligent or grossly negligent conduct in connection with preservation obligations.¹⁰⁸ Instead, the proposal would shield pre-litigation destruction of information from sanctions except where “the party’s actions” resulted in either of the following: “(i) caused substantial prejudice in the litigation and were willful or in bad faith; or (ii) irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation.”¹⁰⁹

¹⁰⁴ See REPORT, *supra* note 6, at 272 (noting that the proposed amendments reject a standard that holds negligence to be sufficient for sanctions, such as the one used in *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002)).

¹⁰⁵ See *id.* at 274.

¹⁰⁶ See *id.* at 317-18.

¹⁰⁷ *Id.* at 321; see *id.* at 318.

¹⁰⁸ See *id.* at 272, 321.

¹⁰⁹ REPORT, *supra* note 6, at 315.

[29] In making a determination on this issue, courts would no longer just rely on their inherent powers.¹¹⁰ Instead, they would employ a multifaceted analysis to examine the nature and motives underlying the party's information retention decisions.¹¹¹ Such factors include:

- (A) the extent to which the party was on notice that litigation was likely and that the information would be discoverable;
- (B) the reasonableness of the party's efforts to preserve the information;
- (C) whether the party received a request to preserve information, whether the request was clear and reasonable, and whether the person who made it and the party consulted in good faith about the scope of preservation;
- (D) the proportionality of the preservation efforts to any anticipated or ongoing litigation; and
- (E) whether the party timely sought the court's guidance on any unresolved disputes about preserving discoverable information.¹¹²

[30] By ensuring the analysis includes a broad range of considerations, the proposed Rule appears to delineate a balanced approach to preservation questions.¹¹³ Such an approach may very well benefit organizations, which could justify a reasonable document retention

¹¹⁰ *See id.* at 320.

¹¹¹ *See id.* at 325-28.

¹¹² *Id.* at 316-17.

¹¹³ *See id.* at 325-28.

strategy on best corporate practices for defensible deletion.¹¹⁴ The Committee contemplates as much, observing that “[t]his subdivision [proposed Rule 37 (e)(1)(B)(i)] protects a party that has made reasonable preservation decisions in light of the factors identified in Rule 37(e)(2), which emphasize both reasonableness and proportionality.”¹¹⁵

[31] While the draft amendments to Rule 37(e) provide some key protections for enterprises, the proposed Rule also addresses some of the lingering concerns from the plaintiffs’ bar.¹¹⁶ For example, the Rule specifically empowers the court to order “additional discovery” or other “curative measures” when a litigant has destroyed information that it should have retained for litigation.¹¹⁷ Under these provisions, an aggrieved party can ferret out the circumstances surrounding the destruction of that data.¹¹⁸ If the party uncovers evidence suggesting the destruction was sufficiently grievous, it could ultimately justify the imposition of sanctions under either of the above tests.¹¹⁹

E. The Instant Rules Proposals Will Impact Organizations

[32] To be sure, the amendments the Committee has proposed will have a direct impact on organizations. For example, the draft revisions to Rule 37(e) clearly emphasize the need for companies to develop reasonable

¹¹⁴ Kozubek, *supra* note 17.

¹¹⁵ REPORT, *supra* note 6, at 321.

¹¹⁶ *See id.* at 314-15, 320-21.

¹¹⁷ *Id.* at 314-15.

¹¹⁸ *See id.* at 320-21.

¹¹⁹ *See id.* at 320-23, 325-28.

information retention policies, along with a workable litigation hold procedure.¹²⁰ The enterprise that does so could simultaneously eliminate large amounts of information and reduce its discovery costs and legal exposure.¹²¹

[33] Another effect of the proposed changes is that they will force companies to address discovery matters on an expedited timeframe.¹²² The truncated time periods for the service of a complaint and the issuance of a scheduling order mean parties would have less time to prepare for the commencement of discovery.¹²³

[34] In addition, the proposals spotlight the need for litigants to be prepared to address substantive discovery issues early in the case. This is evidenced by the draft requirement that litigants discuss ESI preservation and Rule 502(d) orders at the Rule 26(f) conference and the Rule 16(b) scheduling conference.¹²⁴ The proposed advent of early Rule 34 document requests is also exemplary of this substantive discovery issue as it would require litigants to more thoroughly vet discovery issues at the

¹²⁰ Cf. Dembin & Favro, *supra* note 1 (suggesting some steps that in-house lawyers can take on behalf of their organizational clients to change the manner in which discovery is conducted).

¹²¹ See *id.*; see also *supra* Part II.D.

¹²² REPORT, *supra* note 6, at 261 (“The case-management proposals reflect a perception that the early stages of litigation often take far too long. ‘Time is money.’ The longer it takes to litigate an action, the more it costs. And delay is itself undesirable.”).

¹²³ See *supra* Part II.C.3.

¹²⁴ See *supra* Part II.C.1-2.

Rule 26(f) conference.¹²⁵ The elimination of open-ended, rolling document productions under a revised Rule 34(b)(2)(B) also underscores the need for better discovery preparations and expedited compliance.¹²⁶

[35] The proportionality changes to Rule 26(b)(1) will also impact organizations.¹²⁷ Companies seeking to stave off overly broad requests will need to better understand the nature of their relevant data if they are to articulate with the necessary precision the burdens associated with production.¹²⁸ Otherwise, disproportionate production orders will continue to be issued.¹²⁹ In contrast, companies that have a grasp of their relevant information stand a greater chance of making the case to narrow the scope of the requests or having the costs of discovery shifted under the proposed amendment to Rule 26(c).¹³⁰

[36] In summary, there should be little dispute that the proposed amendments will affect litigants. The question for organizations,

¹²⁵ See *supra* Part II.C.1.

¹²⁶ See *supra* Part II.B.2.

¹²⁷ See *supra* Part II.B.1.

¹²⁸ See generally *Pippins v. KPMG LLP*, No. 11 Civ. 0377(CM)(JLC), 2011 U.S. Dist. LEXIS 116427, at *23-27 (S.D.N.Y. Oct. 7, 2011), *aff'd*, 279 F.R.D. 245 (S.D.N.Y. 2012) (discussing proportionality standards).

¹²⁹ See *id.*

¹³⁰ See *supra* Part II.B.3. See generally *Eisai Inc. v. Sanofi-Aventis U.S., LLC*, No. 08-4168 (MLC), 2012 US. Dist. LEXIS 52885 (D.N.J. Apr. 16, 2012) (invoking proportionality standards to deny substantially all of the plaintiff's document requests).

however, is whether they will take the necessary measures to improve their information governance so they are prepared for the Rules changes once they are enacted.

III. PRACTICAL SUGGESTIONS FOR MEETING THE INFORMATION GOVERNANCE CHALLENGES POSED BY THE DRAFT RULES CHANGES

[37] If enterprises expect to address the likely effects of the proposed Rules amendments, they will need to take proactive steps to ensure they can do so.¹³¹ While there are no quick or easy solutions to these problems, an increasingly popular method for effectively dealing with them is through an organizational strategy referred to as information governance.¹³² At its core, information governance is a comprehensive approach that companies adopt to satisfy the challenges associated with information retention, data security, privacy, and e-Discovery.¹³³ Organizations that have done so have been successful in addressing the costs and risks associated with these formerly distinct disciplines.¹³⁴

¹³¹ See Charles R. Ragan, *Information Governance: It's a Duty and It's Smart Business*, 19 RICH. J.L. & TECH. 12, ¶ 9 (2013), <http://jolt.richmond.edu/v19i4/article12.pdf>; Dean Gonsowski, *Inside Experts: Information Governance Takes the Stage in 2012*, INSIDE COUNSEL (Jan. 27, 2012), <http://www.insidecounsel.com/2012/01/27/inside-experts-information-governance-takes-the-st>.

¹³² See Ragan, *supra* note 131, at ¶¶30-33.

¹³³ See Gonsowski, *supra* note 131.

¹³⁴ See, e.g., *E.I. du Pont De Nemours & Co. v. Kolon Indus., Inc.*, No. 3:09cv58, 2011 U.S. Dist. LEXIS 45888, at *46-48 (E.D. Va. Apr. 27, 2011) (holding that sanctions were not appropriate where emails were eliminated pursuant to a good faith information retention policy before a duty to preserve attached).

[38] While there are many steps that enterprises can take to implement an effective information governance program, the five that I discuss in this Part are essential for those companies seeking to satisfy the draft Rules changes and thereby decrease the costs and delays associated with the discovery process. They include developing reasonable information retention policies; preparing an effective litigation hold process; creating policies governing employee mobile device use; deploying technologies for ESI collection, search, and review; and developing a more coordinated and better managed relationship with outside counsel. I consider each of these steps in turn.

A. Develop Reasonable Information Retention Policies

[39] If a company is really intent on obtaining more cost-effective results in discovery under the proposed Rules, it should examine its strategy for information retention.¹³⁵ The time to conduct this examination is not in the crisis atmosphere of complex litigation.¹³⁶ Instead, it should be part of the business plan for the organization.¹³⁷ Effective information retention requires each business unit to identify the records that it creates, why it creates them, whether to retain them and for how long, who gets access to these records, and where the records are stored.¹³⁸ The organization that can easily determine whether relevant

¹³⁵ See Anne Kershaw, *Proposed New Federal Civil Rules—Part One (Data Disposition & Sanctions)*, EXCHANGE (ARMA Metro NYC, New York, N.Y.), Nov.–Dec. 2013, at 10, 13, <http://www.armanyc.org/files/Nov-Dec%202013%20FINAL.pdf> (opining that “organizations will have every reason to make sure that they routinely dispose of documents that do not need to be retained” if the proposed changes to Rule 37(e) are enacted).

¹³⁶ See Ragan, *supra* note 131, at ¶¶ 42-43.

¹³⁷ See *id.*

¹³⁸ See *id.*

records exist and where they should be located will clearly be ahead when litigation inevitably arises.¹³⁹

[40] This, in turn, should lead to the development of top-down information retention policies.¹⁴⁰ Enterprises can hardly hope to decrease their discovery spending if their retention policies are antiquated, inadequate, or arbitrarily observed.¹⁴¹ Indeed, the casebooks are replete with examples of companies whose discovery costs skyrocketed because they failed to properly manage their data with reasonable retention protocols.¹⁴² The case of *Northington v. H&M International* is particularly instructive on this issue.¹⁴³

[41] In *Northington*, the court issued an adverse inference instruction to address the defendant company's destruction of key e-mails and other ESI.¹⁴⁴ The company failed to preserve those records because it did not

¹³⁹ See *Brigham Young Univ. v. Pfizer, Inc.*, 282 F.R.D. 566, 572-73 (D. Utah 2012) (denying plaintiffs' fourth motion for doomsday sanctions since evidence was destroyed pursuant to defendants' "good faith business procedures").

¹⁴⁰ See Gonsowski, *supra* note 131.

¹⁴¹ See *Doe v. Norwalk Cmty. Coll.*, 248 F.R.D. 372, 378 (D. Conn. 2007) (denying defendants' request to invoke the so-called "safe harbor" provision under Rule 37(e) where the defendants failed to observe their own document retention policies).

¹⁴² See, e.g., *United Med. Supply Co. v. United States*, 77 Fed. Cl. 257, 274 (2007) (sanctioning defendant for allowing materials to be destroyed by its "antiquated" retention policies); *Doe*, 248 F.R.D. at 378.

¹⁴³ *Northington v. H&M Int'l*, No. 08-CV-6297, 2011 U.S. Dist. LEXIS 14366, at *43, *45-46 (N.D. Ill. Jan. 12, 2011).

¹⁴⁴ *Id.* at *58-61.

think to implement a pre-litigation information retention strategy.¹⁴⁵ For example, the company neglected to establish a formal document retention policy.¹⁴⁶ Instead, “data retention . . . was evidently handled on an ad hoc, case-by-case basis.”¹⁴⁷ This lack of organization eventually led to the loss of key data, costly motion practice, and the court’s sanctions award.¹⁴⁸

[42] To avoid these negative consequences, companies should insist that their in-house counsel work with IT professionals, records managers, and business units to jointly decide what data must be kept and for what length of time.¹⁴⁹ By so doing, companies can spearhead the development of retention policies that are reasonable in relation to the enterprise’s business needs and its litigation profile.¹⁵⁰ This should eventually lead to the systematic elimination of useless, superfluous, and/or harmful data in an organized and reasonable fashion.¹⁵¹ If performed in this manner, it is unlikely that such document destruction would be viewed as spoliation under the draft revisions to Rule 37(e) or much of the existing case law on this issue.¹⁵²

¹⁴⁵ *See id.* at *22-25.

¹⁴⁶ *Id.* at *21.

¹⁴⁷ *Id.*

¹⁴⁸ *Northington*, 2011 U.S. Dist. LEXIS 14366, at *16-19, *21.

¹⁴⁹ *See Gonsowski*, *supra* note 131.

¹⁵⁰ *See id.*

¹⁵¹ *See Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 1322 (Fed. Cir. 2011) (approving information retention policies that eliminate documents for “good housekeeping” purposes); *Gonsowski*, *supra* note 131.

¹⁵² *See, e.g., Viramontes v. U.S. Bancorp*, No. 10 C 761, 2011 U.S. Dist. LEXIS 7850, at *8, *10-13 (N.D. Ill. Jan. 27, 2011) (citing FED. R. CIV. P. 37(e)) (denying sanctions

B. Prepare an Effective Litigation Hold Process

[43] If information retention policies are to be effective for purposes of the draft revisions to Rule 37(e), they must be accompanied by a workable litigation hold process.¹⁵³ Without a workable approach to litigation holds, the entire discovery process may very well collapse.¹⁵⁴ For documents to be produced in litigation, they must first be preserved.¹⁵⁵ Documents cannot be preserved if the key players or data source custodians are unaware that they must be retained.¹⁵⁶ Indeed, employees and data sources may discard or overwrite ESI if they are oblivious to a preservation duty.¹⁵⁷ This would leave organizations vulnerable to data loss and court sanctions, regardless of the proposed changes to Rule 37(e).¹⁵⁸ No recent case is more instructive on this than *E.I. du Pont de Nemours v. Kolon Industries*.¹⁵⁹

motion since the emails at issue were eliminated pursuant to a good faith retention policy before a duty to preserve was triggered).

¹⁵³ See, e.g., *id.* at *8-10, *12-13 (citing FED. R. CIV. P. 37(e)).

¹⁵⁴ See, e.g., *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 803 F. Supp. 2d 469, 509-10 (E.D. Va. 2011) (issuing an adverse inference jury instruction as a result of the defendant's failure to distribute a timely and comprehensive litigation hold after its obligation ripened to retain relevant ESI).

¹⁵⁵ See, e.g., *id.* at 508-09.

¹⁵⁶ See, e.g., *id.* at 507-09.

¹⁵⁷ See *Oleksy v. General Elec. Co.*, No. 06 C 1245, 2013 U.S. Dist. LEXIS 107638, at *33-35 (N.D. Ill. July 31, 2013) (ordering the production of defendant's litigation hold instructions as a discovery sanction for failing to preserve relevant evidence that was purged from a database).

¹⁵⁸ See *Micron Tech., Inc. v. Rambus Inc.*, 917 F. Supp. 2d 300, 316, 327 (D. Del. 2013) (declaring defendant's patents unenforceable as a discovery sanction to address its failure

[44] In *Du Pont*, the court issued a stiff rebuke against defendant Kolon Industries for failing to issue a timely and proper litigation hold.¹⁶⁰ That rebuke came in the form of an instruction to the jury that Kolon executives and employees deleted key evidence after the company's preservation duty was triggered.¹⁶¹ The jury responded by returning a \$919 million verdict in favor of DuPont.¹⁶²

[45] The destruction at issue occurred when Kolon deleted e-mails and other records relevant to DuPont's trade secret claims.¹⁶³ After being apprised of the lawsuit and then receiving multiple litigation hold notices, various Kolon executives and employees met together and identified ESI that should be deleted.¹⁶⁴ The ensuing data destruction was staggering:

to preserve email backup tapes, paper documents and other ESI). *But see* Brigham Young Univ. v. Pfizer, Inc., 282 F.R.D. 566, 572-73 (D. Utah 2012) (denying plaintiffs' fourth motion for doomsday sanctions since evidence was destroyed pursuant to defendants' "good faith business procedures").

¹⁵⁹ *See Du Pont*, 803 F. Supp. 2d at 510.

¹⁶⁰ *Id.* at 501-02, 509-10.

¹⁶¹ *Id.* at 509-10.

¹⁶² E.I. du Pont De Nemours & Co. v. Kolon Indus., Inc., 894 F. Supp. 2d 691, 721 (E.D. Va. 2012) (entering a 20-year product injunction against the defendant); Press Release, McGuire Woods, Jury Returns \$919 Million for DuPont in Trade Secrets Theft Case (Sept. 15, 2011), available at [http://mcguirewoods.com/News/Press-Releases/2011/9/Jury>Returns-\\$919-Million-for-DuPont-in-Trade-Secrets-Theft-Case.aspx](http://mcguirewoods.com/News/Press-Releases/2011/9/Jury>Returns-$919-Million-for-DuPont-in-Trade-Secrets-Theft-Case.aspx).

¹⁶³ *Du Pont*, 803 F. Supp. 2d at 478-82.

¹⁶⁴ *Id.* at 478, 480-82, 501-05.

nearly 18,000 files and e-mails were destroyed.¹⁶⁵ Furthermore, many of these materials went right to the heart of DuPont's claim that key aspects of its Kevlar formula were allegedly misappropriated to improve Kolon's competing product line.¹⁶⁶

[46] Surprisingly, however, the court did not blame Kolon's employees as the principal culprits for spoliation.¹⁶⁷ Instead, the court criticized the company's attorneys and executives, reasoning they could have prevented the destruction of information through an effective litigation hold process.¹⁶⁸ This was because the three hold notices circulated to the key players and data sources were either too limited in their distribution, ineffective since they were prepared in English for Korean-speaking employees, or were too late to prevent or otherwise alleviate the spoliation.¹⁶⁹

[47] The *Du Pont* case underscores the importance of developing a workable litigation hold process as part of the company's overall information governance plan.¹⁷⁰ As *Du Pont* teaches, organizations should identify what key players and data sources may have relevant information.¹⁷¹ Designated officials who are responsible for preparing the

¹⁶⁵ *Id.* at 480.

¹⁶⁶ *Id.* at 480, 482, 489.

¹⁶⁷ *Id.* at 501.

¹⁶⁸ *Du Pont*, 803 F. Supp. 2d at 501 (holding that Kolon's "counsel and executives should have affirmatively monitored compliance with the [litigation hold] orders.").

¹⁶⁹ *Id.* at 479, 494.

¹⁷⁰ *See generally id.*

¹⁷¹ *See id.* at 500.

hold should then draft the hold instructions in an intelligible fashion.¹⁷² Finally, the hold should be circulated immediately to prevent data loss.¹⁷³ It is only by following these suggestions that organizations can ensure that information subject to a preservation duty is actually retained and thereby avoid sanctions under the proposed amendments to Rule 37(e).¹⁷⁴

C. Create Policies Governing Mobile Device Use

[48] Another aspect of information governance that can help companies address the impact of the Rules proposals is the development of policies governing the use of mobile devices.¹⁷⁵ These devices—especially smartphones and tablet computers—are at the forefront of digital age innovations affecting businesses today.¹⁷⁶ While these mobile devices

¹⁷² *See id.*

¹⁷³ *See Du Pont*, 803 F. Supp. 2d at 500.

¹⁷⁴ *See, e.g.,* *Viramontes v. U.S. Bancorp*, No. 10 C 761, 2011 U.S. Dist. LEXIS 7850, at *12-13 (N.D. Ill. Jan. 27, 2011) (citing FED. R. CIV. P. 37(a)(5)(B)) (denying sanctions motion since defendant issued a timely litigation hold to preserve relevant documents once a preservation duty attached).

¹⁷⁵ *See* PHILIP BERKOWITZ ET AL., LITTLER REPORT, THE “BRING YOUR OWN DEVICE” TO WORK MOVEMENT: ENGINEERING PRACTICAL EMPLOYMENT AND LABOR LAW COMPLIANCE SOLUTIONS 1, 45 (2012), *available at* <http://www.littler.com/files/press/pdf/TheLittlerReport-TheBringYourOwnDeviceToWorkMovement.pdf> (detailing legal challenges regarding mobile device use such as implementing legal holds, protecting trade secrets, and proving misappropriation).

¹⁷⁶ *See* Greg Day, *Overview from Greg Day On the Topic of Bring Your Own Device—The Challenges Facing Today and How This Trend Will Evolve in the Future*, SYMANTEC (Apr. 23, 2012), <http://www.symantec.com/tv/news/details.jsp?vid=1555866669001> (describing the various challenges associated with mobile devices in the workplace).

have revolutionized the way in which business is conducted, they have also introduced a myriad of security, privacy, and e-Discovery complications for enterprises.¹⁷⁷

[49] In particular, mobile device use lessens the extent of corporate control over confidential business information.¹⁷⁸ Whether that information consists of trade secrets, proprietary financial data, or attorney-client privileged communications, mobile devices allow employees to more easily disclose and misappropriate that information than they otherwise could have with traditional computer hardware.¹⁷⁹ With a single touch of a smartphone screen, an employee can direct sensitive company data to personal cloud providers, social networking sites, or Wikileaks pages.¹⁸⁰ Any of these scenarios could prove disastrous for an organization.¹⁸¹

¹⁷⁷ See BERKOWITZ, *supra* note 175, at 10.

¹⁷⁸ See Henry Z. Horbaczewski & Ronald I. Raether, *BYOD: Know the Privacy and Security Issues Before Inviting Employee-Owned Devices to the Party*, ACC DOCKET, Apr. 2012, at 71, 72, available at http://www.ficlaw.com/Links/raether/Rir_byod.pdf (“Security starts with knowing what data resides where, and who has access to that data. With employee-owned devices, the main unique issue from a security perspective is loss of control.”).

¹⁷⁹ See *id.*

¹⁸⁰ See Lisa Milam-Perez, *Little Mendelson Attorney Warns of Pitfalls of “BYOD”*, WOLTERS KLUWER (July 29, 2012), <http://www.employmentlawdaily.com/index.php/2012/07/29/littler-mendelson-attorney-warns-of-pitfalls-of-byod/> (describing best practices for workplace policies regarding mobile device use: “No use by friends and family members! ‘I got the most guff for this one . . . and I imagine you probably will too. I know your kid likes to play Angry Birds, and I know you bought it with your own money,’ but it’s an essential control”); *Privacy Roundtable Highlights*, RECORDER (Mar. 5, 2013), <http://www.law.com/jsp/ca/PubArticleCA.jsp?id=1202591017099> (discussing the risk of

[50] Furthermore, an enterprise has the challenge of preserving and producing information maintained on a mobile device.¹⁸² The logistical challenges of locating, retaining, and turning over that data—all while trying to observe employee privacy—present complications for satisfying the proposed Rules amendments, among many other things.¹⁸³

[51] To address these and other problems associated with these devices, organizations will need to develop workable use policies.¹⁸⁴ Such policies will need to address how employees should handle company data on mobile devices, regardless of whether those devices are work-issued or whether they belong to the employee.¹⁸⁵ They should also delineate the nature and extent of the enterprise’s right to access data on the employee

misappropriation of company data by family members sharing devices that may also be used for work under an employer’s mobile device policy).

¹⁸¹ See Milam-Perez, *supra* note 180 (discussing the “potential liability and other risks” of bring your own device policies).

¹⁸² See Ragan, *supra* note 131, at ¶ 16 (noting that companies must keep certain information for various time periods and the effect of new technologies on information retention).

¹⁸³ See *id.*; see also Greg Buckles, *A Quick Forensics Lesson: The Smart Phone Is Much More Than Just a Hard Drive*, LEGAL IT PROFS. (July 17, 2012), <http://www.legalitprofessionals.com/legal-it-columns/guest-columns/4471-a-quick-forensics-lesson-the-smart-phone-is-much-more-than-just-a-hard-drive> (describing various challenges surrounding the preservation and collection of ESI from mobile devices).

¹⁸⁴ See Susan Ross, *Unintended Consequences of Bring Your Own Device*, LAW TECH. NEWS, Mar. 7, 2013, at 3, available at <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202591156823&thepage=1>.

¹⁸⁵ See Milam-Perez, *supra* note 180; *Privacy Roundtable Highlights*, *supra* note 180.

device, particularly for discovery purposes.¹⁸⁶ To address inevitable privacy concerns that arise when trolling through an employee device for discoverable data, technologies could be downloaded on to that device to segregate and encrypt company information from personal materials.¹⁸⁷ Such a measure would also help prevent an employee's family or friends from accessing confidential ESI.¹⁸⁸

[52] Another best practice for enabling more rapid preservation and production of mobile device ESI is to eliminate any notion that the employee has a reasonable expectation of privacy in the device.¹⁸⁹ While this can likely be done by policy for work-issued devices, it should probably be secured by separate agreement from an employee who is using a personal device under a "bring your own device" policy.¹⁹⁰ The organization that has an unfettered right to obtain relevant ESI from a mobile device will more likely satisfy the preservation, proportionality, and accelerated compliance expectations of the proposed Rules amendments.¹⁹¹

¹⁸⁶ See Day, *supra* note 176.

¹⁸⁷ See Philip J. Favro, *Inviting Scrutiny: How Technologies are Eroding the Attorney-Client Privilege*, 20 RICH. J.L. & TECH. 2, ¶ 158 (2013), <http://jolt.richmond.edu/v20i1/article2.pdf>.

¹⁸⁸ *Id.*

¹⁸⁹ See, e.g., Michael Z. Green, *Against Employer Dumpster-Diving for Email*, 64 S.C. L. REV. 323, 341 (2012).

¹⁹⁰ See *id.* at 341, 362-63.

¹⁹¹ See generally Howard Hunter, *Social Media and Discovery*, 24 N.Y. ST. B. ASS'N INT'L L. PRACTICUM 117, 117, 119-21 (2011) (describing the interplay between privacy strictures and discovery obligations).

D. Deploy Technologies for ESI Collection, Search, and Review

[53] Just as technology can facilitate compliance with company mobile device policies, ESI collection, search, and review technologies can help companies satisfy the expedited discovery objectives of the Rules proposals.¹⁹² This undoubtedly includes cutting edge innovations such as predictive coding and visualization tools.¹⁹³

[54] Predictive coding employs machine-learning technology to more readily pinpoint relevant ESI than would be possible for human reviewers.¹⁹⁴ If properly utilized, predictive coding can also reduce the staff required to conduct document reviews.¹⁹⁵ On the other hand, visualization tools use analytics and machine learning to provide companies with a better understanding of the nature of their relevant information.¹⁹⁶ This allows for the detection of trends, relationships, and

¹⁹² See Patrick J. Walsh, *Rethinking Civil Litigation in Federal District Court*, 40 NO. 1 LITIG. 6, 6-7 (2013).

¹⁹³ See *id.* at 7 (“A better method for searching large databases is predictive coding.”).

¹⁹⁴ See *Moore v. Publicis Groupe*, 287 F.R.D. 182, 190 (S.D.N.Y. 2012) (detailing the cost and review benefits that predictive coding technologies may offer over traditional review methods).

¹⁹⁵ See *id.*

¹⁹⁶ Tal Z. Zarsky, “*Mine Your Own Business!*”: *Making the Case for the Implications of the Data Mining of Personal Information in the Forum of Public Opinion*, 5 YALE J. L. & TECH. 4, 9 n.27 (2003) (discussing the functions and ostensible benefits of visualization technologies).

patterns within the universe of that information; all of which can expedite the search and review process.¹⁹⁷

[55] Enterprises would also be well served to familiarize themselves with traditional e-Discovery technology tools such as keyword search, concept search, email threading, and data clustering.¹⁹⁸ With respect to keyword searches, there is significant confusion regarding their continued viability given some prominent court opinions frowning on so-called blind keyword searches.¹⁹⁹ However, most e-Discovery jurisprudence and authoritative commentators confirm the effectiveness of certain keyword searches so far as they involve some combination of testing, sampling and iterative feedback.²⁰⁰

¹⁹⁷ See Jacob Tingen, *Technologies-That-Must-Not-Be-Named: Understanding and Implementing Advanced Search Technologies in E-Discovery*, 19 RICH. J.L. & TECH. 2, ¶¶ 1-2, 43 (2012), <http://jolt.richmond.edu/index.php/407/> (explaining the benefits of using visualization tools in discovery over traditional review methods).

¹⁹⁸ See Philip Favro, *Mission Impossible? The eDiscovery Implications of the ABA's New Ethics Rules*, E-DISCOVERY 2.0 (Aug. 30, 2012), <http://www.clearwellsystems.com/e-discovery-blog/2012/08/30/mission-impossible-the-ediscovery-implications-of-the-abas-new-ethics-rules/> (describing the importance of using traditional and new technologies to satisfy discovery obligations).

¹⁹⁹ See, e.g., *Moore*, 287 F.R.D. at 190-91; *William A. Gross Const. Assocs, Inc. v. Am. Mfrs. Mut. Ins. Co.*, 256 F.R.D. 134, 135 (S.D.N.Y. 2009) (“This case is just the latest example of lawyers designing keyword searches in the dark, by the seat of the pants, without adequate (indeed, here, apparently without any) discussion with those who wrote the emails.”).

²⁰⁰ See *William A. Gross*, 256 F.R.D. at 135-36; *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 260-62 (D. Md. 2008) (“Selection of the appropriate search and information retrieval technique requires careful advance planning by persons qualified to design effective search methodology. The implementation of the methodology selected should be tested for quality assurance; and the party selecting the methodology must be

[56] Regardless of the tools that a litigant selects for collection, search, and review, some form of technology is ultimately necessary to meet the proposed Rules changes. It is not difficult to envision the problems that companies will have litigating under the revised Rules without using some combination of these tools.²⁰¹ For example, enterprises will find it difficult to intelligently discuss discovery matters at the Rule 26(f) conference or the Rule 16(b) scheduling conference. Nor will they be able to establish—much less meet—good faith production deadlines required by proposed Rule 34(b)(2)(B). While various other scenarios similar to these abound, it is sufficient to observe that e-Discovery in 2014 and beyond will require help from technology.²⁰²

E. Better Management of Outside Counsel

[57] A final measure that companies should consider is developing a more carefully managed relationship with their retained outside counsel.²⁰³ More of an outgrowth of information governance, such a well-managed relationship has the potential to keep client discovery costs more

prepared to explain the rationale for the method chosen to the court, demonstrate that it is appropriate for the task, and show that it was properly implemented.”).

²⁰¹ See Walsh, *supra* note 192, at 7 (“The biggest problem I see with electronic discovery is that lawyers are using 20th-century technology—that is, obtaining all of the documents, organizing them in folders, and trying to read and digest them—to address 21st-century production.”).

²⁰² See *id.*

²⁰³ See Shawn Cheadle and Philip J. Favro, *Push or Pull: Deciding How Much Oversight is Required of In-house Counsel in eDiscovery*, ACC DOCKET, May 2013, at 82, 89 (describing some of the ways that in-house counsel can obtain better advocacy from its retained outside counsel).

reasonable while guiding counsel to litigate within the bounds of the proposed Rules changes.²⁰⁴

[58] The first step that companies can take in this regard is to state their expectations for how discovery should be conducted at the time of retention or at the commencement of a suit.²⁰⁵ A realistic budget and staffing, considering those expectations, must be addressed.²⁰⁶ Companies should also emphasize to their engaged lawyers the importance of satisfying the requirements of the proposed Rules, particularly proportionality standards.²⁰⁷ While these requirements may be overlooked or even unknown to many attorneys, clients are bound—under penalty of sanctions—to ensure that their discovery efforts meet these standards.²⁰⁸ Moreover, company efforts to insist on proportional discovery may be rewarded with decreased preservation and collection costs.²⁰⁹

[59] It is also crucial that organizations communicate with their outside lawyers regarding pertinent aspects of their information governance

²⁰⁴ *See id.* at 89-90.

²⁰⁵ *Id.* at 89.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ Cheadle & Favro, *supra* note 203, at 89; *see* FED. R. CIV. P. 26(g)(3).

²⁰⁹ *See generally* Eisai Inc. v. Sanofi-Aventis U.S., LLC, No. 08-4168 (MLC), 2012 U.S. Dist. LEXIS 52887 (D.N.J. Apr. 16, 2012); Pippins v. KPMG LLP, No. 11 Civ. 0377(CM)(JLC), 2011 U.S. Dist. LEXIS 116427 (S.D.N.Y. Oct. 7, 2011), *aff'd*, 279 F.R.D. 245 (S.D.N.Y. 2012).

plan.²¹⁰ To decrease the possibility for misunderstandings, companies should provide ready access to appropriate information technology personnel and relevant business leaders (the owners of the relevant information) to outside counsel.²¹¹ Outside counsel cannot be effective—and may inadvertently stumble into a costly e-Discovery sideshow—if they are unfamiliar with the company’s information governance and retention policies.²¹² In contrast, having such information will enable outside counsel to more easily negotiate key issues surrounding the discovery of ESI at the Rule 26(f) conference and Rule 16(b) scheduling conference.²¹³ Moreover, open communication regarding this matter will facilitate strategy and logistics regarding the preservation and collection of relevant information.²¹⁴

[60] By taking these steps, organizations will increase their likelihood of compliance with the Rules proposals. In addition, having such an organized strategy and partnership will reduce discovery delays and related legal fees that typically result from poor planning.²¹⁵

²¹⁰ See Kershaw, *supra* note 135, at 13 (noting that “lawyers will need to have a good understanding of their client’s records management and disposition policies”).

²¹¹ See *id.*

²¹² See *id.* at 11, 13.

²¹³ See *id.* at 13 (“[E]ngaging in early discussions with adversaries . . . means we can finally replace preservation uncertainty—the reason why organizations save everything—with preservation certainty.”).

²¹⁴ See *id.*

²¹⁵ See Gonsowski, *supra* note 131.

IV. CONCLUSION

[61] Compliance with the proposed Rules amendments does not need to be an elusive concept. Organizations can prepare for the Rules amendments by taking the initiative to implement or update their information governance strategy. By following the suggestions that I delineate in this Article, along with other best practices, enterprises can satisfy the new requirements under the draft Rules revisions. In so doing, they will likely reduce the costs and burdens associated with discovery—both now and in the future.