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The Federal Rules Of Civil Procedure: Politics In The 2013-2014 Revision

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Presenter Information

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THE FEDERAL RULES OF CIVIL PROCEDURE: POLITICS IN THE 2013-2014 REVISION

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ABSTRACT

Pre-trial discovery is perpetually controversial. Parties advantaged by strict privacy can often avoid justice when this is disadvantageous to their interests. Contrawise, parties advantaged by relaxed litigation privacy can achieve justice when all facts are accessible irrespective of their repositories, ownership or control. American-style pre-trial discovery in civil and regulatory enforcement is relatively rare around the world. U.S. discovery rules open nearly all relevant and non-privileged data for use by opposing parties. The traditional discovery process was costly and time consuming in the world of tangible paper data. However, these burdens have increased, rather than diminished as often predicted, as most data migrates to electronically stored information (ESI). This article provides a mid-stream assessment of the second major revision effort to accommodate U.S. discovery processes to the broad and deep problems arising during the past 20 years of document discovery experience with predominately ESI data sources.

1. INTRODUCTION: HISTORICAL CONTEXT

Political pressures to reform the discovery process are decades old. The current environment is witnessing yet another chapter in this unfolding controversy. Two major factions are at play: transparent justice vs. confidential privacy. This is a classic tension in law, politics, business, personal liberty and all information sciences and technologies.

1.1 Transparency Leads to Justice

First, the forces of transparency seek to improve justice by requiring professionalism among litigators from the practicing bar by inculcating values of honesty and forthrightness in providing evidence relevant to the dispute irrespective of its source, current residence or its ultimate implications. Most of history in the 20th and now the 21st centuries has witnessed progress by this group in securing a gradual opening of data sources, now predominately electronically stored information (ESI), achieving transparency that contributes to justice.

1.2 Privacy and Confidentiality - Essential to Liberty

Second, the forces of confidentiality and privacy have largely fought a rear-guard action by resisting openness, touting the historic advantages of confidentiality and lauding the liberty inherent in greater

privacy. This opposition may be the critical balance of the modern era, with access to full information essential to justice in litigation and the setting of just public policies hanging in the balance. The forces of confidentiality and privacy have some potent arguments about how excessive costs of regulatory and criminal investigations and civil pre-trial discovery actually divert scarce societal resources. Furthermore, the mere threat of costly discovery is coercive, the threat of debilitating litigation compels settlements that may also be unjust.

2. PAST REFORMS OF INVESTIGATORY PRACTICES

Investigatory practices have varied widely throughout history. Most despotic governments have coerced the production of evidence by deploying torture and threats against person, family and property to induce confession and testimony. As the U.S. colonies moved towards independence, many of these practices were regularly used by the British crown, thus inspired the liberty reforms inherent in the U.S. Constitution and particularly in the Bill of Rights by balancing privacy and confidentiality against the public interest. Indeed, most lay persons understand that: (1) the 3rd Amendment protects the home as castle from quartering of occupying or domestic armed forces; (2) the 4th Amendment protects from unlawful searches and seizures by requiring probable cause before enforcing warrants and prohibiting general warrants; (3) the 5th Amendment protects personal intimacy from self-incrimination and holds private property paramount to government interests; (4) the 6th Amendment overcomes secrecy and individual privacy in trials (requires a public record, cross-examination); (5) the 9th and 10th Amendments allow for privacy rights to be inferred in from the Constitution or enacted by the states; and (6) the 14th Amendment provides a strong basis to withhold or limit access to information, including the freedom of personal choice.

Few nations have accepted the degree of openness as exists in the U.S. arguably contributing greatly to both justice and liberty essential to the U.S. phenomenal success in such a short period of two to three centuries. Indeed, nations of the civil law tradition provide for few civil lawsuits among private parties to access information held by opposing parties. The U.S. nearly stands alone in opening up the files and records of opposing parties in regulatory and private civil litigation to the opposition to “mine” for smoking gun correspondence, meeting records and other documents. Of course, criminal investigatory practices in many nations still take the “inquisitorial” path when limited government resources are deployed against wrongdoers. Unfortunately, this power is chronically abused for political purposes throughout history and all over the world, even in contemporary situations.

In the 20th century, pre-trial discovery has grown hugely in the U.S. creating unique default rules that all parties in regulatory and civil litigation must search for, find, produce and disclose relevant data in their possession to the opposition. Only attorney-client privilege, attorney work product privilege and various protective orders (to maintain trade secrecy) are exceptions to the broad discovery rules that the U.S. has developed in the 20th century. The major 1938 amendments to the Federal Rules of Civil Procedure (FRCP) provided the first major watershed in opening up the files and personnel of opposing parties to much deeper revelation. This development was met with joy by opposing parties now able to prove their cases as well as dissonance by opposing parties who appeared to lose cases due to a form of self-incrimination. The states largely follow the FRCP lead, with some major exceptions, of course.

2.1 The FRCP 2006 Revisions Directly Address ESI

As corporate records have become highly valuable to prove and defend against civil and regulatory claims, their migration in the 1990s into electronic forms as ESI has become a watershed in both the volume and complexity of their production as well as their high probative value. After a difficult decade of transition from predominately paper-based records in the early 1990s to predominately ESI in the early 21st century, the first major reassessment of pre-trial discovery resulted in the 2006 revision of the FRCP. This resulted in the firm establishment of a new field of endeavor for litigating

attorneys, law office staffs, the information technology (IT) industry and a fast growing cottage industry in litigation support that employs, investigators, computer forensics, electronic discovery (ED) support firms, among others. The federal courts adapted existing paper-based discovery practice to the huge new costs and potential successes of ED, first by precedent in trials and eventually with the adoption of the 2006 revision to the FRCP. Again, the states have generally followed the federal rules, with some states expanding the FRCPs intrusiveness with special treatments.

3. CURRENT REFORM PRESSURES – THE FEDERAL RULES OF CIVIL PROCEDURE

The FRCP, as interpreted by courts, enable and constrain the electronic discovery aspects of CyberForensics. The FRCP was revised in December 2006, effective in 2007, to more closely address the predominance of electronic evidence. While these '06 FRCP revisions have worked much better than the piecemeal adaptations made by (largely) a few tech-savvy federal judges in the decade prior, there are continuing complaints that eDiscovery is still too costly, time consuming and susceptible to misuse in civil and regulatory litigation in the federal courts. Of course, the states largely mirror these federal rules and can be expected to eventually adopt similar revisions.

Interestingly for the Information Sciences and Technologies and for Security and Risk Analysis disciplines, FRCP revision witnesses a convergence between ED and information governance. Indeed, according the influential Gartner group:

...Information Governance (IG) ... [is] the specification of decision rights and an accountability framework to encourage desirable behavior in the valuation, creation, storage, use, archival, and deletion of information. It includes the processes, roles, standards, and metrics that ensure the effective and efficient use of information in enabling an organization to achieve its goals.¹

Information governance is an expanding new discipline taking pieces of enterprise integration, enterprise architecture, organizational design, cyber-forensics, digital rights management and most other IT fields as components. Security and privacy aspects of these disciplines are increasingly important.

4. FRCP REVISION – A NON-STANDARD POLITICAL PROCESS

The following introductory quote is illustrative of the latest revision effort and the unique process of revising the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Federal Rules of Evidence and Federal Bankruptcy Rules:

The Judicial Conference's Advisory Committee on Civil Rules recently forwarded to the Standing Committee on Rules of Practice and Procedure several proposed amendments to the Federal Rules of Civil Procedure that would, if adopted, modify the parameters and procedures governing discovery in civil litigation. As discussed more fully below, the proposals address the scope and proportionality of discovery under Rule 26(b)(1); reduce the current presumptive limits for depositions and interrogatories; for the first time set a numerical limit on requests for admission; and establish a framework for the imposition of remedial measures or sanctions where a party fails to comply with their preservation obligations. The development and approval process for court rules differs from traditional legislation by Congress and the President in some significant ways.²

¹ See e.g., Logan, Debra, *What is Information Governance? And Why is it So Hard?*, GARTNER BLOG NETWORK (Jan.11, 2010) accessible at http://blogs.gartner.com/debra_logan/2010/01/11/what-is-information-governance-and-why-is-it-so-hard/

² Shaffer, Craig B. & Ryan T. Shaffer, *Looking Past The Debate: Proposed Revisions To The Federal Rules Of*

According to one writer, “The proposed amendments are intended to reduce expense and delay in federal litigation by promoting cooperation among attorneys, proportionality in discovery, and judicial case management.”³

The Judicial Conference Advisory Committees on Bankruptcy and Civil Rules of the United States Courts published a preliminary draft of proposed FRCP revisions.⁴ Public hearings were held in Washington on November 7, 2013 and in Phoenix on January 9, 2014. Transcripts of these public meetings reveal many arguments and counter-arguments as well as the special interests behind the revision effort and its opposition.⁵ In addition, opinion editorials and expert commentary on the pressures for reform as well as assessments of the revision drafts proliferated in 2013 – 2014 creating an interesting political duel over this essential public policy matter as resolved in non-standard parliamentary procedures at the federal level.

5. THE MAJOR ISSUES IN THE 2014 REVISION EFFORT

Several major issues are presented by the FRCP revision effort, including at least the following:

- Arguments to Revise due to Unfairness of Existing Rules
- Counter-Arguments Against Revisions
- The Proportionality Principle
- The Political Process of FRCP development
- Presumptive Limits on eDiscovery Scope (Depositions, Interrogatories)
- Changes in Sanctions for Failure to Preserve ESI
- Political Pressures, the interests and influences of constituencies

In this team research report the IST 453 class at the college of Information Science and Technology at the Pennsylvania State University individually addressed several major components of this FRCP revision subject area. Each class member drafted sections of this master class-wide team report. Instructor Bagby then integrated these to form a useful and authoritative report on these big changes to the field of eDiscovery affected through the FRCP revision process as revealed in the following sections.

6. POLITICAL PRESSURES

The Rules of Federal Civil Procedures are once again going through a change. There are strong pressures to change the rules and just as strong oppositions to keep them the same. Each side of this debate is expressing its concern through blogs, web pages and comment threads on the government’s page that deals with regulation changes.

Civil Procedure, 7 FED.CT.L.REV. 178 (2013) *accessible at*:
<http://www.fclr.org/fclr/articles/html/2010/Shaffer2.pdf>

³ Goldich, Marc A., *Differing Opinions from Pa. On FRCP Amendments*, LAW 360 (Feb.19, 2014) *accessible at*: <http://www.law360.com/articles/511107/differing-opinions-from-pa-on-frcp-amendments>

⁴ *Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure*, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (Aug. 2013 - Preliminary Draft) *accessible at*: <http://www.uscourts.gov/uscourts/rules/preliminary-draft-proposed-amendments.pdf>

⁵ *See*, <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/public-hearings/civil-hearing-transcript-2013-11-07.pdf> and <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/public-hearings/civil-hearing-transcript-2014-01-09.pdf>

6.1 The Arguments

For those in favor of amending the current Federal Rules of Civil Procedures, the basis of their arguments fall in one of these categories: discovery costs being too high, discovery leading to prolonged time consuming litigation, e-discovery becoming susceptible to misuse in civil and regulatory litigation and the litigation scope being too broad .

The three most important committee proposals that are circulating are: (1) a clear national standard that says companies could be punished for discarding information only if they did so in bad faith to hamper litigation; (2) a narrower scope of discovery that focuses on the claims and defenses of each case rather than any information that might lead to admissible evidence; and (3) confirming judicial authority under Rule 26(c) of the Federal Rules of Civil Procedure to allocate the costs of discovery to the party requesting discovery rather than the party responding.⁶

Although these are important aspect for change, they mostly focus on the financial expanses which seem to be the most prevailing concern for companies and the judicial system.

On the opposite side of the coin, those who oppose changes to the Federal Rules of Civil Procedures argue that discovery costs are not as high as they are perceived to be, that there is no evidence that discovery is misused by those requesting it, there is no sweeping radical reform that can fix this problem, litigation cost and court cost would increase for the average cases that operate well under the current rules and that narrowing the scope of discovery could lead to a disproportionate constraint on finding the evidence needed to prove a case.

6.2 Where are the political pressures coming from?

6.2.1 Pressures favoring change to the Federal Rules of Civil Procedure

To put it into prospective, those who favor the changes to the current Federal Rules of Civil Procedure tend to be large companies, insurance providers, defense attorneys and even financial institutions. Growing litigation cost is usually the main argument for those who desire change and this increase in cost can be seen according to research done by the RAND Institution for Civil Justice. Discovery costs have been rising sharply and as of January 2014 the median cost of discovery is \$1.8 million. That being said, it is important to note that unlike and an average, median cost cannot be skewed by large outliers like an average. Medians are the most common cost and considering how many litigation cases there are in a year and how many of those require discovery, \$1.8 as a median discovery cost is extremely significant. To further drive the point of financial burden to the judicial system, in a lawsuit involving Fannie Mae, the Federal Housing Enterprise Oversight (a government agency that was not even sued) had to spend \$6 million just to access electronic data in response to defendants' subpoenas. Some business even took the initiative to comment on regulations.gov to voice their concerns; one such business that did do in favor of changes to the FRCP was the Ford Motor Company.

6.2.2 Exemplar Advocating Strict Reform - The Ford Motor Company

Over the past 20 years, The Ford Motor Company has faced over a thousand product liability cases and dozens of other types of cases. In the large majority of these cases, Ford was the defendant and as the defendant, Ford states that it has faced some injustices regarding discovery practices. Ford states that in many of the cases they have been involved in, discovery has been used for purposes other than resolving the case at hand. Ford has been involved in cases in which the plaintiffs use discovery to raise costs and gain tactical advantages or settlement leverage, for discovery on discovery and for other satellite litigations. Based on these claims and Ford's extensive litigation experience, Ford seeks

⁶ Kyl, Jon, *A Rare Chance to Lower Litigation Costs*, WALL ST. J (Jan. 20 2014) accessible at: <http://online.wsj.com/news/articles/SB10001424052702304049704579321003417505882>

to make the argument that such practices should not be tolerated and that the judicial system should comply with their plea.⁷

6.2.3 Pressures against change to FRCP

Opposition for the proposed changes is also taking form. The opposition for the FRCP is not as large in numbers but its strength comes from litigation experience. Mostly, the opposition for the FRCP comes from the plaintiffs' lawyers and some law schools. A notable pressure against FRCP comes from joint comments by professors of distinguished law schools in America.⁸

6.2.4 Exemplar Opposing Strict Reform - Joint Comments by Law School Professors

The joint comments that were voiced on regulations.gov come from professors Helen Hershkoff, Lonny Hoffman, Alexander A. Reinert, Elizabeth M. Schneider, David L. Shapiro, and Adam N. Steinman. These professors argue that amendments to the FRCP have been taking place since the rules inception in 1938 and that to this day there are always complaints of the inadequacy of the rules. Further, the joint comments of these professors state that with the proposed changes there would be no relief from the financial burden, that there isn't a sweeping radical reform to resolve the problem, that there will be an increased in litigation cost to the average cases that work under the current FRCP and that discovery costs are not disproportionate in the vast majority of cases.

To support their claims, these professors consulted a 2008 Federal Justice Center (FJC) analysis. This study analyzed thousands of civil cases and narrowed their scope to only include cases that would "likely over-represented how much discovery takes place in a typical civil case in federal court." The study revealed that the median cost in these cases, including attorneys' fees was \$20,000 for defendants and \$15,000 for plaintiffs. These numbers are drastically different from other studies and the perception that discovery costs in litigation are extremely high. This in turn would favor the argument made by the law professors that discovery is not as expensive as most would think.

Despite their objections to change in the FRCP, these professors still acknowledge that "the real worry is that discovery costs that are disproportionate to the case value". However, notwithstanding their objection, the professors still don't believe there should be a change in the FRCP as "the data fail to demonstrate that disproportionality is a systematic problem." This suggests that they believe another factor is at play that drives these disproportionate discovery costs and that specifically targeting these areas could fix the problems within the FRCP.⁹

The Judicial Conference's Advisory Committee on Civil Rules gathered together to discuss proposed amendments to the Federal Rules of Civil Procedure on August 15, 2013. Through these amendments, the Advisory Committees seeks to increase the efficiency in the early stages of litigation, provide assurance that discovery is proportional to the case on hand, and limit all burdensome costs that result from a vague scope of discovery or the necessity of document preservation. Each proposal is closely being analyzed to determine whether the proposal sufficiently fulfills the objective of the Federal Rules of Civil Procedure- "[securing] the just, speeding, and inexpensive determination in every action and proceeding."

⁷ Lampe, Doug, *Ford Motor Company Comments, Regulations.gov*, (Nov. 22, 2013) accessible at: <http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0343>

⁸ Fax, Charles X, *Proposed Changes to Federal Rules Prompt Pushback*. AM. BAR ASSN, 2014. Web. 28 Apr. 2014 accessible at: http://apps.americanbar.org/litigation/litigationnews/civil_procedure/041614-pushback-federal-rules.html

⁹ Hershkoff, Helen, Lonny Hoffman, Alexander A. Reinert, Elizabeth M. Schneider, David L. Shapiro, & Adam N. Steinman., *Proposed Changes to Federal Rules Prompt Pushback*. N.p., Feb. 5, 2014, accessible at: http://apps.americanbar.org/litigation/litigationnews/civil_procedure/041614-pushback-federal-rules.html

7. SCOPE OF DISCOVERY

The proportionality amendments attempt to mitigate the costs incurred during litigation through a more defined and refined scope of discovery.

Rule 26(b)(1) confines the scope to address only what is “proportional to the needs of the case.” Proportionality is defined in Rule 26(b)(2)(C)(iii) stating, “it is 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.” This amendment provides a stricter confinement on discovery because the committee believed lawyers were using this “reasonably calculated” provision to exploit their overly broad scope of discovery. The “reasonably calculated” provision allows all discovery to be addressed as long as it is “reasonably calculated to lead to the discovery of admissible evidence.”

The literature has been modified to provide a more precise definition to state, “[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable.” In addition the Committee is seeking to change the literature that allows the court, upon reasonable cause, to request the discovery of all evidence “relevant to the subject matter.” This vague description could easily be used to address various issues outside the scope of the case at hand. The committee proposes to amend the rule to clearly state, “[p]roportional discovery relevant to any party’s claim or defense suffices.” This modification would limit the scope of discovery to address only the claim or defenses relevant to the case at hand. The party that is seeking discovery can no longer claim they satisfy the relevance standard by conducting a fishing expedition within the area of relevancy in search for evidence. Courts uphold parties to a duty to mitigate the scope of discovery to what is pertinent to the case and claims at hand.

Critics fear that by restricting the scope of discovery, law enforcement will not be able to collect sufficient evidence to prove their case for the triers of fact. In contrast the defendant claim the amendments are not conservative enough. They argue the perception of relevance is subjective and can be abused to cultivate disproportional discovery unless the courts issue a materiality standard.

Rule 26(c) addresses the ability for court to appropriately allocate the expenses incurred throughout the discovery process among both parties, commonly known as cost-shifting. The courts understand that the vast amount of Electronically Stored Information (ESI) has substituted many tradition methods of stored information. The cost associated with the production of document has vastly increased since the emergence of ESI. The question at hand is often “How do we mitigate these costs?” The Federal Rules for Civil Procedures have established a proportionality test, which limits the scope of discovery to minimize the burden and produce benefits that outweigh the costs. The assumption under these rules is that “the responding party must bear the expense of complying with discovery requests, but [it] may invoke the district court’s discretion under Rule 26(c) to grant orders protecting [it] from “undue burden or expense.” It is critical that the court have the ability to allocate the costs of discovery to prevent unreasonable cost to be incurred by each party in effort to prove their case.

8. LIMITS FOR DISCOVERY TOOLS

Although the limits for discovery, addressing Rule 30, 31, 33, and 36, appear strictly conservative, they represent the starting point for negotiation. The Advisory Committee is considering both parties when addressing these proposals. Of course, like the rest of the United State legal system, these matters are subject to exceptions to address the matter on hand.

Critics fear, much like their concerns with limiting the scope of discovery, that confining the numerical limits on discovery will hinder the effectiveness of the discovery process and therefore the resolution of the case at hand. They argue that by limiting discovery the evidence will not prove to be

sufficient to hold up in court. However, the amendment acknowledges the various situations and allows the court to approve additional requests or modify the limit under “good cause.” For example, the court may grant a case more than five depositions if the case reveals more than five potential witnesses. For example, in the Sandusky case it would be unreasonable to limit prosecutors to five witness depositions and fifteen interrogatories due to the nature of the case and the vast amount of potential witnesses.

Rule 26(b)(2)(C)(i) states that the court must confine discovery to avoid duplicated or unreasonable cumulative evidence. The parties have a duty to strive to find the least burdensome and cost effective method of discovery. When requesting additional discovery tools the party must prove that they are seeking the most cost effective alternative under Rule 33 and there is “good cause” for such discovery. The additional are not viewed as tools but means to identify non-disputable fact.

These amendments are not aimed to restrict discovery but rather to produce a more efficient and cost effective litigation process during pretrial discovery. See Table 1 for summary data on discovery limits discussed here.

Table 1 Proposed Limits for Discovery

Discovery Tool	Current Limit	Proposed Limit	Additional requests available with court approval?
Depositions	10 depositions/party	5 depositions/party	yes
	7 hours each	6 hours each	yes
Interrogatories	25	15	yes
Requests for Admission (other than authenticity)	None	25	yes

9. CHANGES IN SANCTIONS FOR FAILURE TO PRESERVE ESI

Discovery during civil cases has become more and more difficult as electronically stored information (ESI) becomes more prominent. Rule 37 of the Federal Rules of Civil Procedure (e) gives defendants safe harbor from sanctions for the fair or routine destruction of ESI: this means that unless there are exceptional circumstances, a court may not impose any sanctions on a party for inability to provide ESI lost during typical operations of an electronic information system.¹⁰

In early 2013, the Advisory Committee agreed that this rule be replaced completely by a new rule that would narrow the scope on proper preservation procedure that must be taken by litigants during times of litigation in order to avoid later sanctions. Specifically, the amendment focuses on sanctions rather than direct regulation of preservation details. It aims to guide a court by recognizing a party that shows reasonable/proportionate preservation measures as immune to sanctions. Except in notable cases where a party’s actions fully deprive another of opportunity to present or defend against claims in the litigation, sanctions will only be appropriate upon finding a party’s willful spoliation or bad faith. This new subdivision is based on the routine alteration and deletion of information that occurs as a result of the day-to-day computer use; negligence does not constitute sufficient culpability to support sanctions.

¹⁰ Fed. R. Civ. P. 37(e).

The rule also points out the factors a court may choose to examine to determine to what extent a failing-to-produce party was on notice that litigation was likely, the issuance of litigation holds, the reasonability of the party's preservation efforts, how proportional the preservation efforts are compared with past legal proceedings, and whether the party sought guidance [from the court] regarding unresolved ESI preservation disputes.¹¹ Clearly, this amendment attempts to provide more significant protections against inappropriate sanctions and reassure people who may normally try to over-preserve in fear of risking spoliation sanctions. Indeed, this may reassure parties who are seeking relief from the ever-growing insurmountable amount of evidence piling up (e.g. in the wake of recent patent wars between Apple and Samsung) that discourages them from proper and regular record destruction. Although they may find resolve in this, as with all generalized rules, practitioners must be mindful of the inevitable interpretation by courts of "willfulness" and "bad faith."¹²

Although the level of culpability is standardized, application of factors in this rule such as "reasonableness" will be undoubtedly construed differently among the federal courts. This is a way in which many analysts see the changes as threatening towards innocent parties. Under the initial proposal, sanctions were authorized for loss of discoverable information only when they caused significant prejudice in the litigation and were lost as a result of bad intent. It also authorized measures such as "additional discovery," "curative measures," and requiring the party to pay reasonable expenses or attorney fees that could be applied without prejudice.¹³ These methods would act as precursors to imposing sanctions.

The earlier proposal was rejected because there was little confidence that it would significantly reduce "over-preservation" and was too restrictive of judicial discretion. The revision's main focus was on encouraging courts to address losses in the ESI context, where the majority of problems occur. It was concluded that the introductory language could be improved by requiring that the rule only be applied if information "cannot be restored or replaced through additional discovery" (such as a backup or early prototype/draft) and if it was "lost because a party failed to take reasonable steps to preserve the information." Reasonability is the most significant word, since it will be at the judge's discretion to determine on a case-specific basis-- this reasonableness and proportionality focus makes it clear that a party's preservation efforts are not expected to be perfect.

Rule 37 generally addresses the failure to make disclosures or to cooperate in discovery, and sets forth remedies that a court may impose for failure to preserve discoverable ESI that reasonably should have been preserved in the face of anticipated litigation. The main advantages of standardizing this rule are the increased sense of certainty for corporations about establishing preservation policies and understanding the consequences of failure. Currently, most corporations see the ambiguity as too uncertain to give it a significant amount of worry, or are less afraid of the consequences of failing to uphold "good faith" preservation procedures in times where it will only incriminate them as not outweighing the benefits. Basically, they would rather be caught red-handed burning the evidence and pay a fine than to reveal the greater, more embarrassing truth which may also publicize more easily. Parties on both sides of the courtroom will benefit from the additional guidance of this clarification and hopefully see generally more concise discovery processes in cases as a result of it.

¹¹ Hoang, R., *Revisiting E-Discovery*, (Jan. 1, 2013) *accessible at*: <http://www.lacba.org/showpage.cfm?pageid=14489>

¹² Allman, T., *Will new rule prompt harsh sanctions on innocent parties for lost ESI?*. ACEDS (April 24, 2014), *accessible at*: <http://www.aceds.org/comments-to-2014-ediscovery-rules-package-allman/>

¹³ Gibbons, P., *Update of Proposed Rule Changes: A Universal Federal Sanctions Standard for the Failure to Preserve ESI Could be a Reality*. EDISCOVERY LAW ALERT, (May 6, 2013) *accessible at*: <http://www.ediscoverylawalert.com/2013/05/articles/legal-decisions-court-rules/update-of-proposed-rule-changes-a-universal-federal-sanctions-standard-for-the-failure-to-preserve-esi-could-be-a-reality/>

It is clear that eDiscovery has changed the world entirely, especially in the courtroom. The type of language used to make traditional discovery laws cannot be applied to electronically stored information—some suggest the use of predictive coding to determine proper preservation procedures across the board, while others feel it is an “evolving technology.” Over-preservation of ESI is a problem throughout the corporate world, costing companies tens of millions of dollars and countless hours a day spent on dealing with litigation holds. The guiding changes set in motion should reduce this amount of time by helping standardize the process of dealing with these holds, which may pave the way for quicker, more economically friendly methods in the future.

A good example of this argument is that of *Sekisui Am. Corp. v. Hart*,¹⁴ a case defined by willfulness without a culpability requirement, putting strain on litigants who do not know how much ESI to preserve because they cannot predict in which jurisdiction future litigation will occur. In major litigation like this, sanctions are used as a tactic and parties do not know what and how much to preserve. Redefining “willful” in terms of intentional conduct or conduct that is significantly reckless so as to enable somebody to foresee a high likelihood of harm would place burden on those parties which knowingly spoliated data that was in any way associated with some wrong-doing.

While it remains to be seen whether the changes will have the promised impacts, there is no doubt that trying to increase fairness and efficiency is a desired change by everyone, and this will only be able to be more closely examined in practice. The evolution set about should promote corporate data governance and reward companies that invest in data governance strategies such as data classification, eDiscovery and defensible expiration of data. Ultimately, the 2013 amendments are good for business and for litigants. They should reverse the upward trend of eDiscovery costs and ease the burden of annual IT operating budgets, in addition to freeing parties from the burden of over-preserving content and providing the ‘peace of mind’ to routinely enforce the disposition of expired content in important cases.

10. COUNTER-ARGUMENTS AGAINST THE 2013 FRCP REVISION EFFORT

On August 14, 2013, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States released a preliminary draft of Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure. With these proposed amendments, the committee offered the public the opportunity to send comments pertaining to these amendments to the federal decision-making site *Regulations.gov*. Even if lawyers are not involved at the federal level, many states choose to adopt civil procedure rules similar to those contained within the Federal Rules of Civil Procedure, which demonstrates that these revision efforts have a large impact on the courts at both the federal and state level.

Since its posting on August 14, 2013, approximately 2,359 comments have been received, which are to be reviewed by the rules committees comprised of experienced trial and appellate lawyers, judges and scholars. While these comments will naturally address almost every proposed amendment, there are several rules in particular that are argued to favor either the plaintiff or the defendant.

Rule 37(e) of the current Federal Rules of Civil Procedure, *Failure to Provide Electronically Stored Information*, states that:

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.¹⁵

¹⁴ No. 12 Civ. 3479 (SAS)(FM), 2013 WL 4116322 (S.D.N.Y. Aug. 15, 2013 No. 12 Civ. 3479, 2013 WL. 11.

¹⁵ Fed. R. Civ. P. 37(e).

However, due to the increased usage of e-Discovery in litigation, the committee tasked with proposing amendments to the Federal Rules of Civil Procedure has offered a revision of this clause, renamed to *Failure to Preserve Discoverable Information*, and has added new sanctions and factors that are to be taken into account when imposing sanctions. The new rule stipulates, “[i]f a party failed to preserve discoverable information that should have been preserved in the anticipation or conduct of litigation,” the court may:

- (B) impose any sanction listed in Rule 37(b)(2)(A) or give an adverse-inference jury instruction, but only if the court finds that the party’s actions:
 - (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.¹⁶

Although these new factors sound much more specific than the previous Rule 37(e), they allow the courts to impose sanctions under any circumstance, assuming that the party failed to preserve discoverable information that was to be anticipated to be preserved for litigation. Currently, if a party has a “routine, good-faith operation of an electronic system,” failure to provide information as a result of this operation is unable to be sanctioned (Federal Rules of Civil Procedure). However, with the proposed Rule 37(e), even if a party has a routine, good-faith operation of an electronic system, failure to preserve discoverable information in anticipation of litigation would potentially lead to sanctions against the responsible party should they have deprived a party the opportunity to use the lost information.

With regards to e-Discovery and cyber forensics, these proposed amendments mean that having a routine data destruction policy is not enough to be free from sanctions. While having a regular data retention and destruction policy is good practice, if it is known that data being destroyed will likely be requested in anticipation of litigation, it is the duty of the party to preserve this discoverable information as an exception to their data retention and destruction policies.

Some argue that the revision of Rule 37(e) is partial towards plaintiffs, and that the factors must be removed to prevent undue burden upon potential defendants should litigation arise. Timothy Pratt, President of the Federation of Defense & Corporate Counsel, argues, “The factors do not assist in the determination of whether the failure to preserve information was willful and in bad faith and resulted in substantial prejudice.”¹⁷ Pratt also finds, “This anticipation of litigation trigger is vague and would force parties to make preservation decisions before they know whether a lawsuit is even coming.”¹⁸ In order to combat this, he recommends that Rule 37(e)(1) “adopt a ‘commencement of the litigation’ trigger for determining when preservation obligations are imposed.”¹⁹

Pratt is not the only one at disagreement with the proposed modifications to Rule 37(e). In a letter addressed to the Committee on Rules of Practice and Procedure, United States District Judge Shira Scheindlin remarks that the revision to Rule 37(e) was added to address preservation, but instead only

¹⁶ *Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure*, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (Aug. 2013 - Preliminary Draft) accessible at: <http://www.uscourts.gov/uscourts/rules/preliminary-draft-proposed-amendments.pdf>

¹⁷ Pratt, Timothy A., *Comments to Proposed Amendments to the Federal Rules of Civil Procedure - Letter to Committee on Rules of Practice and Procedure*, *Regulations.gov* (Nov. 14, 2013) accessible at: <http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0337>

¹⁸ *Id.*

¹⁹ *Id.*

did so by sanctioning those for not preserving information. In the letter, Judge Scheindlin finds that there is no distinction between curative measures for loss of information and sanctions themselves. She writes:

in order to impose a sanction listed in Rule 37, the court must find that the spoliating party's action caused 'substantial prejudice' and was 'willful' or in 'bad faith.' This language is fraught with problems.²⁰

In her testimony, Judge Scheindlin shows that this type of language is too vague and will encourage parties to have few reasons to preserve information. In order to combat this, she recommends that more explicit words such as 'reckless' or 'gross negligence' be used in her testimony to the Committee on Rules of Practice and Procedure.

The proposed amendments to Rule 37 have some defense firms concerned, but the proposed amendments to Rule 26 are likely to cause plaintiff firms to be concerned as well. According to the current Federal Rules of Civil Procedure Rule 26(b)(1), "parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense."²¹ However, with these proposed amendments, a new clause would be added that restricts the scope of the discovery to the proportionality of the case:

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. Information within this scope of discovery need not be admissible in evidence to be discoverable.²²

Although this new clause may seem insignificant, it has an enormous impact upon parties attempting to obtain discovery to help their case. With the shift of more and more evidence being digital, performing e-Discovery is much more costly and time-consuming than analog media. Information can be stored in a distributed array of computers and is not necessarily all in one place. Thus, the proposed stipulation for discovery scope sounds reasonable at first. However, some argue that if required information relevant to a party's claim or defense is beyond the scope the case's proportionality, the party's claim or defense will suffer from a lack of information. For this reason, many attorneys have submitted comments regarding the proposed changes to Rule 26(b)(1) to the *Regulations.gov* website.

Traci Hinden, an attorney at the Law Offices of Traci M. Hinden, finds that the proposed revision to Rule 26 makes plaintiff's discovery limited. She writes, "In employment cases, plaintiffs face an uphill battle in obtaining the information they need to prosecute their claims." With regards to the factors determining scope of discovery, Hinden writes:

The proposed rule changes to FRCP 26 would create a far greater expenditure of the court's and parties' limited resources to resolve these issues, rather than any efficiencies that appear to be the underlying goals of proposed changes.²³

²⁰ Scheindlin, Shira, *Comments on Proposed Rules-Letter to Committee on Rules of Practice and Procedure, Regulations.gov* (Jan. 13, 2014) accessible at: <http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0398>

²¹ Fed. R. Civ. P. 26.

²² *Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure*, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (Aug. 2013 - Preliminary Draft) accessible at: <http://www.uscourts.gov/uscourts/rules/preliminary-draft-proposed-amendments.pdf>

²³ Hinden, Traci M., *Re: Proposed Changes to the FRCP That Further Limit Discovery in Civil Cases. Letter to*

Hinden is not the only attorney that finds the revisions to be anti-plaintiff. Almost all of the comments received that mention Rule 26 find it to be partial towards defendants. In addition to the aforementioned considerations, as with the current Rule 26(b)(1), courts may further limit the discovery scope for particular cases.

When proposing amendments to the Federal Rules of Civil Procedure, the consequences for both sides must be reviewed. As shown in the above rules, several of these proposed amendments appear to favor either the plaintiff or defendant. When examining these amendments through the context of e-Discovery and cyber forensics, there are very important considerations; plaintiffs must not be allowed to request an unprecedented amount of information, and defendants should not be liable for producing an overwhelming amount of information that is not completely relevant to the case.

In addition, factors for sanctions such as those proposed for Rule 37(e) must be as explicit as possible. Many companies are moving to distributed computing in the cloud, and data retention policies are truly the only way to prevent data from being lost. Even with today's technological advancements, preserving information in anticipation of litigation would have to be performed manually by information technology staff at many major corporations. If a litigation trigger is vague as such in the proposed amendments to Rule 37(e), defendants may unfairly be sanctioned for failure to preserve information if the Federal Rules of Civil Procedure do not consider a routine, good-faith data retention and destruction policy to be acceptable even in anticipation of litigation.

It is clear that the Federal Rules of Civil Procedure must be updated to reflect the shift from paper to digital media. Previously, it took clear and deliberate effort to destroy evidence through shredding. However, once files on a computer are deleted, they are gone for good unless advanced forensic analysis is performed on hard drives. Thus, changes to Rule 37(e) must be reviewed thoroughly to make sure that parties know when to start preserving data. The current revisions are not complete, and the public's comments will shape the next draft.

District of Maryland Judge Paul Grimm believes that the comments play a large role in shaping the revisions and that the more than 2,000 received comments raise serious questions about whether Rule 37 adequately defines the duty to preserve as well as the factors for sanctions.²⁴ With the more than 2,000 comments received pertaining to the latest revision effort, the subcommittee will re-evaluate their revisions and most likely release the next draft for comments. Although there will always exist those who oppose revisions to the current Federal Rules of Civil Procedure, the revisions will continually become more balanced for plaintiffs and defendants as more feedback is applied to revision effort.

11. PEDAGOGICAL IMPLICATIONS

Upon initial examination, this project appears to be a successful and interesting pedagogical experiment in cyber forensic coursework. Three major implications are evident:

1. Teamwork is an essential and successful pedagogy when problem-based learning (PBL) approaches are deployed with policy-based issues for future forensic practitioners.²⁵

Judicial Conference's Advisory Committee on Civil Rules, Regulations.gov (Feb. 27, 2013) accessible at: <http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0093>

²⁴ Brostoff, Tera E., *Advisory Committee Makes Unexpected Changes to 37(e), Approves Duke Package*, BLOOMBERG BNA. Apr. 14, 2014, accessible at: <http://www.bna.com/advisory-committee-makes-n17179889550>

²⁵ See generally Bagby, John W. & John C. Ruhnka, Development and Delivery of Coursework: The Legal/Regulatory/Policy Environment of Cyberforensics, 1 J.DIGITAL FORENSICS SECURITY & L. -- (2006).

2. Cyber forensic practitioners, litigants and policy makers confront a turbulent and unstable policy environment. Projects permitting immersive student engagement in such subject areas predictably allow students to become much more policy aware enabling lifelong policy experience while improving success at policy problem avoidance.
3. This particular FRCP revision project provides exposure to a unique policy-development framework unlike the traditional industry standardization, state/federal legislation, agency regulation, criminal enforcement or private litigation environments in which cyber forensic practitioners regularly participate.²⁶ Students are enabled to mine very significant comment data repositories in which interested parties attempt to influence rule revisions.²⁷

Extensions to this project include the more obvious academic research dissemination expectations.²⁸ While many students likely are unimpressed with publication of their research, the academic values of impact through distribution, comment and influence remain broadly unmistakable. Therefore, instructors able to gain publication, exposure in scholarly communities and coveted citation can greatly enhance student experience with this team-class report project discussed here.

11.1 Unique Rulemaking Regime for Federal Court Rules

The Legislative Veto survives *Chadda*.²⁹ Few federal regulatory agencies are exposed to invalidation of their rules and regulations by simple nullifying vote by Congress or either house of Congress. However, the Rules Enabling Act delegates court rule promulgation to the U.S. Court System, a judicial branch rulemaking procedure generally inconsistent with the Administrative Procedure Act (APA).³⁰ Under this unique procedure, Congress recognized the unique expertise of the U.S. Judiciary to write the rules for evidence, appellate processes, civil litigation (including all regulatory agency litigation), criminal prosecutions, bankruptcy, admiralty and the federal rules of evidence.³¹

Generally, the Judicial Conference of the United States, the federal courts' policymaking arm, initiates rulemaking by making recommendations. These are based on drafts developed and circulated by the Judicial Conference, including actions by the Judicial Conference's Advisory Committees on Bankruptcy and Civil Rules in the instance of the FRCP.³² Such proposed amendments are circulated to the bench, bar, and public for comment.

²⁶ See, RULES ENABLING Act, Pub.L. 73-415, 48 Stat. 1064, (June 19, 1934) *codified as*: 28 U.S.C. §§ 2071-77.

²⁷ See, Comments-Docket Folder, *Proposed Amendments to the Federal Rules of Civil Procedure*, USC-RULES-CV-2013-0002 regulations.gov accessible at: <http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0337>

²⁸ For example, the National Science Foundation (NSF) requires the dissemination and sharing of research results. All successful awardees must provide a plan for dissemination and sharing and it is likely the NSF imposes additional distribution requirements for non-classified research results. See *Other Post Award Requirements and Considerations*, Ch.VI, AWARD AND ADMINISTRATION GUIDE, National Science Foundation (Jan.2013) accessible at: http://www.nsf.gov/pubs/policydocs/pappguide/nsf13001/aag_6.jsp#VID4

²⁹ *Immigration and Naturalization Service v. Chadha*, U.S. 462 U.S. 919 (1983) (holding legislative veto of deportation rulings permitted to either house of U.S. Congress of Immigration and Nationality Act violates separation of powers and the presentment requirement of U.S. Constitution, Art.I, §7, cl.2 & 3).

³⁰ 5 U.S.C. §§ 500 et seq.

³¹ Congress withdrew the federal courts' powers to modify the Federal Rules of Evidence in 1973 after Congress overrode a Supreme Court approval of the FRE.

³² There are several advisory committees involved in court rule promulgation, including separate committees for appellate, bankruptcy, criminal, and evidence rules. These sub-committees submit the proposed amendment to the Standing Committee for approval.

Drafts are ventilated publicly through very extensive hearing, workshop and comment solicitations. This is a form of notice and comment rulemaking similar but not governed by the APA. Congress then has seven months to veto the rules; Congressional inaction permits the rules to deploy.

This project permitted students to review comments solicited by the Judicial Conference Advisory Committee on Civil Rules and archived at [regulations.gov](http://www.regulations.gov).³³ Proposals, hearing transcripts and individual submitted comment letters represent a huge data archive of relevant policy advocacy relating to electronic discovery rule change proposals. Such data inspired this paper and similar student research on nearly every regulatory issue, federal, state and local, offer opportunities for students to mine archived public documents to access a rich public policy issue advocacy database.

³³ <http://www.regulations.gov/#!docketDetail;D=USC-RULES-CV-2013-0002>

