PBA COMMITTEE & SECTION DAY

The PBA Federal Practice Committee will meet on Thursday, November 21st at the Holiday Inn East, in Harrisburg, from 9:15—10:45 a.m. If you are not able to attend in-person, please participate by phone.

The call-in number is 1-877-659-3786 and the passcode 6677829609#.

SUB-COMMITTEE PREPARES RECOMMENDATIONS

On Aug. 15, 2013, the Standing Committee on Rules of Practice and Procedure approved for publication a report containing proposed amendments to the Federal Rules of Civil Procedure. The Report was released to the bench and bar for a six month public comment period, which includes a series of public hearings held in Washington, D.C., Phoenix and Dallas. The comment period closes February 15, 2014.

A sub-committee of the PBA Federal Practice Committee was convened to develop recommendations to present to the PBA Board of Governors and House of Delegates at their November 20th and 22nd meetings. The recommendations were circulated to all Federal Practice Committee members for review comment and vote prior to submission to other interested PBA committees and sections for comment as required by the PBA by-laws. The Federal Practice Committee’s recommendations will be considered by the Board of Governors on November 20th for waiver onto the House of Delegates calendar November 22.

The recommendations are attached at the end of this newsletter.

PBA MID-YEAR MEETING IN ST. THOMAS, JANUARY 29—FEB 2

Make plans now to join your colleagues for the 2014 PBA Midyear Meeting at Frenchman’s Reef & Morning Star Marriott Beach Resort in St. Thomas, U.S. Virgin Islands. Experience firsthand the warmth and hospitality of “America’s Paradise,” combined with the opportunity to earn more than nine hours of continuing-legal-education credits. On January 31, the Federal Practice Committee will be presenting a program entitled “The Impact of the 2012-2013 Term of the Supreme Court of the United States on Federal Practice.” The registration deadline for the Midyear meeting is December 20, 2013.
A district court’s remand of a case is not immediately appealable unless the remand order finally resolves an important issue.

In *Papotto v. Hartford Life & Accident Insurance Co.*, 2013 U.S. App. LEXIS 19660 (3d Cir., September 26, 2013), Papotto sought payment of benefits from Hartford Life & Accident Insurance Co. (“Hartford Life”) under an accidental death and dismemberment policy in relation to her husband’s death. Hartford's Plan Administrator denied payment of benefits to Papotto because the deceased had consumed alcohol prior to his death. The parties appealed to the District Court, which remanded the case to the Plan Administrator after concluding that the policy implicitly required a causal connection between intoxication and the loss. Hartford appealed the District Court's determination to the Third Circuit.

After the notice of appeal was filed, the Third Circuit *sua sponte* raised a question about its appellate jurisdiction. Both Papotto and Hartford Life asserted that the Court had appellate jurisdiction to hear an appeal from the remand order. After concluding that the District Court’s remand order was not a final order under 28 U.S.C. § 1291, and that it was also not appealable under the collateral order doctrine, the Court concluded that the remand order was not immediately appealable as a final judgment. As the Court put it, the remand order has neither “finally resolved” the issue of eligibility, nor will it evade future appellate review. The Court then dismissed the appeal for lack of jurisdiction.

For parties to preserve an argument for appeal, they must have raised the same argument in the district court – merely raising an issue that encompasses the appellate argument is not enough.

In *United States v. Joseph*, 2013 U.S. App. LEXIS 19315 (3d Cir. September 19, 2013), the Third Circuit had occasion to address the degree of particularity required for a party to preserve a suppression argument for appeal purposes. There, the appellant filed a motion to suppress evidence. To support the motion, he raised both a *Terry* argument and a lack of probable cause argument, which was based on the arresting officers’ lack of expertise. After his motion was rejected, the appellant was convicted. On appeal, the appellant again raised the lack of probable cause argument, but it was based on *mens rea*. The Court made a point to note that there is an important distinction between raising an *argument* and raising an *issue*. For parties to preserve an argument for appeal, they must have raised the same argument in the district court. Merely raising a broader issue that encompasses the appellate argument is insufficient. Therefore, the degree of particularity required to preserve an argument is exacting. Because the appellant failed to preserve the sole argument made on appeal, the Court affirmed the order of the District Court.
Rule 23(a) requirements are not mere pleading rules, and the role of courts, whether at the initial certification stage or during approval of class settlement, are required by the Supreme Court and by the Federal Rules of Civil Procedure to ensure compliance with Rule 23 at all stages of litigation.

In Rodriguez v. National City Bank, 2013 U.S. App. LEXIS 16615 (August 12, 2013), a group of African-American and Hispanic plaintiffs filed a class action complaint against National City Bank (the "Bank"), alleging that the Bank had an established pattern or practice of racial discrimination in the financing of residential home purchases in violation of the Fair Housing Act and the Equal Credit Opportunity Act. After participating in preliminary proceedings, the parties arrived at a proposed settlement agreement. The District Court granted preliminary approval of the settlement and preliminarily certified the proposed class under Federal Rule of Civil Procedure 23(b)(3). Before the Court reached a final determination on the settlement and class certification, however, the Supreme Court issued its opinion in Wal-mart Stores, Inc. v. Dukes. The District Court observed that Rule 68 offers of judgment cannot be made in citizen suits filed under the RCRA because application of Rule 68 in such instances would violate the Rules Enabling Act by discouraging the very citizen suits that Congress intended to promote.

On appeal, the Third Circuit disagreed with the District Court, concluding that Rule 68 offers of judgment may be made in this context. In its reasoning, the Court looked to Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1430, 1442 (2010), a Supreme Court case, to resolve the conflict between the Federal Rules of Civil Procedure and the RCRA. The Court observed that, while the RCRA encourages plaintiffs to bring meritorious suits to enforce environmental laws and Rule 68 encourages settlement of civil suits, there is nothing incompatible with these two objectives. Thus, the Court concluded that application of Rule 68 in the context presented here does not violate the Rules Enabling Act. The Court then held that Rule 68 offers of judgment may be made in this context, and reversed the District Court's declaration that the offers of judgment in the instant case were null and void and its decision to bar any further offers of judgment.
U.S. District Court, Eastern District of Pennsylvania
Judges Nitza Quinones, Felipe Restrepo and Jeffrey Schmehl were recently confirmed, while 5 additional vacancies exist by virtue of Judges Michael Baylson, Curtis Joyner, Eduardo Robreno, Stewart Dalzell and Mary McLaughlin assuming Senior Status. The nominations of Judge Edward Smith and Gerald McHugh are pending before the U.S. Senate.

U.S. District Court Western District Pennsylvania
There are three vacancies as a result of the passing of Hon. Gary Lancaster, the resignation of Hon. Sean McLaughlin and Hon. Terry McVerry assuming Senior Status.

United States Court of Appeals for the Third Circuit
There are currently two Pennsylvania vacancies as the result of Judges Dolores Sloviter and Anthony Scirica assuming Senior Status.

Do you have ideas for a CLE program in your area?
Let the Chair know if you would like us to host a local CLE program in your area, either independently or jointly with your local bar. We are prepared to present our “Tips and Traps” program and are exploring other program topics. The committee is interested in providing educational programs wherever interest exists.

RESOURCES

Pennsylvania Bar Association  www.pabar.org
Become a member of the PBA Federal Practice Committee -  Join now

Federal Judicial Center
http://www.fjc.gov/federal/courts.nsf

U.S. District Court for the Middle District of Pennsylvania
http://www.pamd.uscourts.gov/

U.S. District Court, Eastern District of Pennsylvania
http://www.paed.uscourts.gov/

U.S. District Court Western District Pennsylvania
http://www.pawd.uscourts.gov/

SAVE THE DATES

Jan 29-Feb 2, 2014
PBA Midyear Meeting
Frenchman’s Reef & Morningstar Marriott Beach Resort
St. Thomas, US Virgin Islands

May 7 - 9, 2014
Third Circuit Judicial Conference
Hershey, Pennsylvania. For more information, go to  http://www.ca3.uscourts.gov/save-date
BACKGROUND

• On June 3, 2013 the Standing Committee on Rules of Practice and Procedure approved for publication a report containing proposed amendments to the Federal Rules of Civil Procedure (the “Report”).

• On Aug. 15, 2013, the Report was released to the bench and bar for a six month public comment period, which includes a series of public hearings held in Washington, D.C., Phoenix and Dallas, and the comment period for which closes February 15, 2014.

• If approved by the Standing Committee, the proposed amendments will be submitted to the Judicial Conference with a recommendation for approval, which will in turn be submitted to the United States Supreme Court for approval.

• If approved by the Supreme Court, the United States Congress will have seven months to approve or reject the new rules such that the revised rules may officially be promulgated on or before May 1, 2014, and take effect on or after Dec. 1, 2014.

• The Report contains significant proposed changes to Federal Rules of Civil Procedure 1, 4, 16, 26, 30, 31, 33, 34, 36, and 37.

RECOMMENDATION

The Federal Practice Committee of the Pennsylvania Bar Association makes the following recommendations with respect to some of the proposed rule changes:

1. With respect to the proposed amendments to FRCP 26, the Committee recommends that language should be added to the official comment to the proposed rule change to 26(b)(1) which clarifies that the amount in controversy and the burden or expense of discovery are simply two factors to be considered along with the importance of the issues, the parties resources, and the importance of the discovery sought, and that no single factor may be dispositive or even determinative in the proportionality analysis.

2. With respect to the proposed amendments to FRCP 30, 33 and 36:
   a. The Committee recommends that any official comment to rules setting forth default limits instruct the parties, lawyers and judges that each case should be approached with an open mind and consider deviation from the default limits where appropriate based on the circumstances of each individual case.
   b. The Committee recommends that the default number of interrogatories be left at 25, and that the default number of depositions be moved to 7 or 8, but not the proposed 5.
   c. The Committee recommends limiting the number of requests for admissions to not more than 25.

3. With respect to the proposed amendments to FRCP 37(e), the Committee recommends endorsing the concept of a uniform approach to spoliation sanctions in federal courts. Under the current system, where spoliation sanctions are typically awarded under the courts' inherent authority to manage the discovery process, there is no uniformity in the courts' approach to spoliation...
sanctions across the country. The Committee recommends the creation of a uniform and consistent approach to spoliation sanctions.

4. The Committee also recommends endorsing the careful balance that the amendment establishes with respect to the imposition of an adverse inference for spoliation. As crafted, the amendment lowers the degree of malfeasance required by the spoliating party as the prejudice to the opposing party increases, such that only ordinary negligence is required if the prejudice is extreme, bad faith or willful conduct is required for lesser prejudice, and no adverse inference sanction is available without at least substantial prejudice to the opposing party. The Committee believes that this approach strikes the proper compromise among the competing concerns.

**EXPLANATORY COMMENT**

**Rule 26(b)(1):**

Although there are four discrete changes to Rule 26(b)(1), the Committee’s recommendation is limited to the Standing Committee’s emphasis on proportionality. The Committee agrees as to the need for the change to curb the practice of some litigants to seek overly broad, disproportionate discovery which results in unnecessary waste of time and money and the majority of the members believe Rule 26(b)(1) is the appropriate tool for effecting such change.

The language change to Rule 26(b)(1), increasing an emphasis on proportional discovery, is appropriate because despite the existing language in Rule 26(b)(2)(C), courts have not always insisted on proportionality when warranted. The Federal Rules of Civil Procedure and many state rules already contain factors that—where applied—address proportionality in discovery. However, these factors are rarely applied because of the notion of some that parties are entitled to discover all facts, without limit, unless and until a court says otherwise. Indeed, due to the advent of electronic discovery, it has become increasingly important for courts and parties to apply the proportionality doctrine to manage the large volume of ESI and associated expenses now typical in litigation. The Committee agrees with the solution proposed by the Standing Committee to emphasize that discovery must be limited to what is proportional to the needs of the case as measured by the cost-benefit calculus that is already required by Rule 26(b)(2)(C)(iii).

That said, there are legitimate concerns that, without further clarification by the Standing Committee, the relative weight and importance of each of the factors in the cost-benefit calculus will be determined by the order in which they are listed in the proposed rule. For instance, because it is the first factor listed, the amount in controversy may be viewed by both litigants and courts as the most important factor for making a proportionality determination. It is the opinion of the Committee that the Standing Committee should add a comment to its proposed rule which clarifies that the amount in controversy and the burden or expense of discovery are simply two factors to be considered along with the importance of the issues, the parties’ resources, and the importance of the discovery sought, and that no single factor may be dispositive or even determinative in the proportionality analysis.

With that caveat, the Committee is of the opinion that the proposed change to Rule 26(b)(1) is a minimally invasive way to emphasize a principle that previously existed but was not uniformly applied in practice.

**Rules 30, 33 and 36:**

The Advisory Committee on Civil Rules has proposed the following changes related to default limits on several methods of discovery:

1. Reduce the default limit on the number of depositions under Rules 30 and 31 from 10 to 5.
2. Reduce the default limit on the duration of an oral deposition under Rule 30(d)(1) from one day of 7 hours to one day of 6 hours.
3. Reduce the default limit on written interrogatories under Rule 33(a)(1) from 25 to 15.
4. Impose a default limit on requests for admissions under Rule 36 of 25. (There is currently no limit on requests for admissions or document requests under Rule 34. There is no proposed default limit for document requests.)

The PBA Federal Practice Committee offers the following comments to facilitate discussion on these proposed rule changes:

1. The members of the PBA Federal Practice Committee overwhelmingly share the concern that the proposed new default limits, which are all reductions in available discovery and are combined with a general thrust in the proposed revisions to reduce the time and money spent in discovery, will lead to a new hesitance among some judges to alter those limits. There will be cases and general categories of cases where the reduced limits will be insufficient and a blind, unreasoned one-size-fits-all discovery plan inappropriate. While reducing the cost of discovery is a worthwhile endeavor, a party's access to justice and ability to obtain facts should not be sacrificed solely in the name of reducing costs. Parties, lawyers and judges should approach each case with an open mind and deviate from the default limits where appropriate based on the circumstances of each individual case.

2. A small minority of the members of the Federal Practice Committee oppose lowering the default number of interrogatories to 15 and the default number of depositions to 5. The Committee suggests that the default number of interrogatories be left at 25, and that the default number of depositions not be reduced to a number as low as the proposed 5.

3. The committee generally supports limiting the number of requests for admissions to 25, if not lower, although some Committee members oppose this reduction. While requests for admissions can be used effectively, they generally help discover little information and are often nothing more than an exercise between opposing lawyers that increases costs.

Rule 37:

The proposed amendment to Rule 37(e) deletes the current provision, which provides protection from spoliation sanctions to parties who inadvertently delete electronically stored information as the result of the "routine, good faith operation of an electronic information system" such as a computer. In its place, the amendments substitute an entirely new provision which addresses spoliation sanctions broadly. The new provision allows for an adverse inference instruction only in limited circumstances. If the spoliation "irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the action," then the court may impose an adverse inference sanction if the spoliating party's conduct was either negligent or grossly negligent. If the effects of the spoliation "caused substantial prejudice" to the opposing party, but do not rise to the level of irreparably depriving the opposing party from a meaningful opportunity to present its claims or defenses, then the court may impose an adverse inference sanction only if the spoliation was willful or in bad faith. In all other instances of spoliation, the court may impose curative sanctions, including attorney's fees, but may not impose an adverse inference sanction.

Respectfully submitted,
Hon. D. Michael Fisher, Chair
Federal Practice Committee
Narrowing the Scope of Federal Discovery: 
The Proposed Amendments to the Federal Rules of Civil Procedure  
November 2013  
By Thomas G. Wilkinson, Jr. & Thomas M. O’Rourke

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

In an effort to streamline costs and delay in litigation, the Judicial Conference Committee on Rules of Practice and Procedure (the “Standing Committee”) published proposed amendments to the Federal Rules of Civil Procedure. Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure, pp. 259-60 (Aug. 15, 2013) [hereinafter “Proposed Amendments”]. Unlike previous proposals, which have sought to broaden discovery, this package of proposed rules significantly restricts the scope of discovery and the presumptive number of discovery requests and depositions available.

If the proposed amendments are adopted, discovery requests would be limited to the parties’ “claims and defenses” and tailored to be “proportional to the needs of the case[.]” Id. at 265-66. In addition, absent agreement between the parties or a court order, parties would be limited to 5 depositions, 15 interrogatories and 25 requests for admission. Id. at 267-68, 300-05,
The proposed amendments would also require parties to provide more detail in their responses to document requests under Rule 34. Specifically, Rule 34 would require parties to state their objections with specificity and indicate whether any documents were withheld on the basis of an objection. *Id.* at 269, 307.

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

The proposed amendments have received mixed reviews. Corporate defense counsel have generally favored the amendments as advancing early and effective case management and promoting proportionality and cost savings. Others criticize the proposed amendments as being unduly restrictive. *See* Todd Rugur, *Discovery Rule Changes Greeted with Skepticism in Senate*, Nat’l Law J. (Nov. 11, 2013). For example, U.S. Senator Christopher Coons of Delaware, Chair of the Subcommittee on Bankruptcy and the Court, predicted that reducing the number of depositions, interrogatories and requests for admission would have a negative impact in smaller cases and “could mean that responsible parties will remain unaccountable—not because the plaintiff’s allegations are untrue, but because plaintiff lacks the evidence to prove them.” *Id.* He was particularly concerned about the effect of the proposed amendments in employment,
discrimination and consumer fraud cases, where most relevant evidence is in the possession of the defendant. This same concern has been raised by plaintiffs’ counsel in antitrust cases.

This Article summarizes the most significant proposed rule changes and briefly reviews some of the problems likely to arise when the proposed changes are implemented. For those interested in weighing in on the proposed amendments, the Standing Committee is accepting public comments until February 15, 2014.

The Proposed Amendments to the Federal Rules of Civil Procedure

The Standing Committee has published proposed amendments to the Federal Rules of Civil Procedure aimed at reducing costs and delay in civil litigation. The proposed amendments are based on the recommendations of the Advisory Committee on Civil Rules (“Advisory Committee”) and are specifically designed to increase cooperation among lawyers, proportionality in the use discovery tools, and early and active judicial case management. Toward this end, the Standing Committee proposed significant amendments to Rules 26, 30, 31, 33, 34 and 36 and 37.

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

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

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

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

- Rule 1 would include a “modest” change and provide that the Rules should be “employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.” PROPOSED AMENDMENTS, at 270.
- Rule 4 would be amended to reduce the presumptive time limit for service of a summons and a complaint from 120 to 60 days.
- Rule 16 would be amended to require the court to hold a scheduling conference with the parties face-to-face, by telephone or by other means of simultaneous communication. Id. at 262. The proposed change would also reduce the time limit for a judge to issue a scheduling order, providing that, absent good cause, the court must enter a scheduling order “within the earlier of 90 days after any defendant has been served
Redefining the Scope of Discovery? The Proposed Amendments to Rule 26

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

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

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

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

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

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

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

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

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

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

**Cutting Back on the Number of Interrogatories and Requests for Admission**

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

**Requiring Less “Evasive” Responses to Requests for Production**

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

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

9 The Committee also considered but ultimately did not propose adding a presumptive limit to the number of Rule
34 requests for production. Id. at 267.
materials, and finally conclude that the production is made subject to the objections. The requesting party is left uncertain whether anything actually has been withheld.”Id.

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

A Unified Standard for Imposing Sanctions for Spoliation

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

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

10 The proposed amendments also would add Rule 26(d)(3), which would permit a party to deliver document requests before the Rule 26(f) conference.
11 Compare Residential Funding v. DeGeorge Fin., 306 F.3d 99, 113 (2d Cir. 2002) (holding that negligent destruction of evidence is sufficient to support the imposition of sanctions); Beaven v. U.S. Dept. of Justice, 622 F.3d 540, 554 (6th Cir. 2010) (same); Glover v. The BIC, 6 F.3d 1318, 1329 (9th Cir. 1993) (holding that notice of potential relevance of the evidence will suffice to support an adverse inference); Talavera v. Shah, 638 F.3d 303, 311 (D.C. Cir. 2011) (upholding trial court’s finding that plaintiff was entitled to a “weak” adverse inference where the “destruction was ‘at worst negligent[,]’”) with Hodge v. Wal-Mart Stores, 360 F.3d 446, 450 (4th Cir. 2004) (directing that willful conduct, not negligence, supports the imposition of sanction); Russell v. Univ. of Tex. of Permian Basin, 234 Fed. Appx. 195, 207-08 (5th Cir. 2007) (same); Faas v. Sears, Roebuck & Co., 532 F.3d 633, 644 (7th Cir. 2008) (same); Sherman v. Rinchem Co., 687 F.3d 996, 1007 (8th Cir. 2012) (same); Dalcour v. City of Lakewood, 492 Fed. Appx. 924, 937 (10th Cir. 2012) (same); Rutledge v. NCL (Bahamas), Ltd., 464 Fed. Appx. 825, 829 (11th Cir. 2012) (reflecting that destruction of evidence has to be in bad faith to support an adverse inference instruction). See also U.S. v. Laurent, 607 F.3d 895, 902-03 (1st Cir. 2010) (recognizing that the case law is not uniform regarding the culpability needed to support an adverse inference instruction).
standard.” Proposed Amendments, at 272. Specifically, Rule 37(e) would only permit sanctions where a party’s failure to retain evidence “caused substantial prejudice in the litigation and [was] willful or in bad faith[,]” unless the “other party’s actions ... irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation.” Id. at 315. The proposed Committee Note to Rule 37(e) provides that the amendment is intended to address the concerns of potential parties who have engaged in “extremely expensive overpreservation” due to the current divergence of opinion among federal courts addressing the appropriateness of discovery sanctions. Id. at 318. The proposed amendment, however, does not provide “‘bright line’ preservation directives because bright lines seem unsuited to a set of problems that is intensely context-specific.” Id.

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

(A) the extent to which the party was on notice that litigation was likely and that the information would be discoverable;

(B) the reasonableness of the party’s efforts to preserve the information;

(C) whether the party received a request to preserve the information, whether the request was clear and reasonable, and whether the person who made it and the party consulted in good faith about the scope of preservation;

(D) the proportionality of the preservation efforts to any anticipated or ongoing litigation; and

(E) whether the party timely sought the court’s guidance on any unresolved disputes about preserving discoverable information.

Id. at 316-17.

The proposed amendment also emphasizes that the court may adopt “curative measures” when a party fails “to preserve information that should have been preserved in the anticipation or
conduct of litigation,” regardless of the party’s culpability. Such curative measures could include the imposition of costs and fees, requiring a party “to restore lost information, or to develop substitute information” or “permitting introduction at trial of evidence about the loss of information or allowing argument to the jury about the possible significance of lost information.” Id. at 272, 321.

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

**Should the Proposed Amendments Be Adopted?**

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

Other proposed amendments, however, may go too far – particularly the proposed changes to the scope of discovery under Rule 26 and the number of depositions and interrogatories available under Rules 30, 31 and 33. In addition, some view the proposed test for
spoliation sanctions as improperly requiring the party seeking sanctions to prove that it was prejudiced by the destruction of evidence, even where the destruction was in bad faith.

**The Shifting Scope of Rule 26**

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

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

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

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

An alternative would be to retain the “reasonably calculated” language, but highlight the fact that all discovery sought must be relevant. For instance, Rule 26(b)(1) could be amended to
Restricting the Number of Depositions and Interrogatories

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

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

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


¹⁴ Id. at 4 (“To the extent that a presumptive limit of five total depositions will affect civil cases, those effects are likely to be felt in cases with expert depositions.”).
liability cases involving multiple expert witnesses would readily justify an extension of the new presumptive limit on depositions. It is also not difficult to foresee one side using the presumptive limit as a tactical device to stall and constrict discovery the other side needs to adequately prepare a case for trial or dispositive motion practice.

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

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

The proposed amendments, therefore, should clearly communicate that the presumptive limits are not a “one size fits all” approach to the discovery needs of all cases or particularly classes of cases. It is true that a reduction in the presumptive limits may encourage parties to be more selective in their use of discovery tools. But, if applied inflexibly, these limits could distract the parties (and the court) from the substantive issues in the case and unnecessarily
constrict legitimate discovery of relevant evidence. This point should be specifically addressed in the proposed rule changes or the amended commentary.

*A New Standard for Sanctions Under Rule 37(e)*

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

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

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

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

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

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

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