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Invited Paper - Potential Changes to eDiscovery Rules in Federal Court: A Discussion of the Process, Substantive Changes and Their Applicability and Impact on Virginia Practice

Joseph J. Schwerha
California U of Pennsylvania, United States

Susan L. Mitchell
Altman, Spence, Mitchell & Brown, P.C.

John W. Bagby
Penn State University, College of Info. Sci. & Tech.
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INVITED PAPER
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Joseph J. Schwerha
California U of Pennsylvania
United States

Susan L Mitchell
Altman, Spence, Mitchell &
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United States

John W Bagby
Penn State University
College of Info. Sci. & Tech.
United States

Revision of the Federal Rules

The Federal Rules of Civil Procedure (FRCP) are subject to a unique process also once used in revising the Federal Rules of Evidence (FRE). Today, this process is followed in revisions of the FRCP, the Federal Rules of Criminal Procedure and the Federal Bankruptcy Rules. This unique rulemaking process differs significantly from traditional *notice and comment* rulemaking required for a majority of federal regulatory agencies under the Administrative Procedure Act (APA).¹ Most notably, rule-making for the federal courts' procedural matters remain unaffected by the invalidation of legislative veto. It is still widely, but wrongly believed, that the legislative veto was completely invalidated by *INS v. Chadda*.²

The 2013-2014 FRCP Revisions³

Pre-trial discovery is perpetually controversial. Parties advantaged by strict privacy can often avoid justice that disadvantages their interests. Contrawise, parties advantaged by relaxed litigation privacy can achieve justice when all facts are accessible irrespective of the information's repositories, ownership or control. Controversy stems from this *justice dilemma* but the advocacy largely concerns the injustice resulting from overtly threatened and implicit risk of wasteful harassment.

American-style pre-trial discovery in civil and regulatory enforcement is relatively rare around the globe. Elsewhere corporate privacy remains a durable feudal legacy. U.S. discovery rules open nearly all relevant and non-privileged data for use by opposing parties; non-disclosure agreements (NDA) and non-privilege confidentiality notwithstanding. In the "old world" where most information was embodied as tangible paper data, the traditional discovery process was costly and time consuming. Despite the efficiencies claimed for computerized telecommunications, the individual and societal burdens of pre-trial discovery have actually increased, rather than diminished, 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 the increasing displacement of paper and micro-film/fiche with ESI data sources.

The 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

¹ 5 U.S.C. §551, *et seq.*

² *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983) (invalidating one-house legislative veto on bases of separation of powers and presentment, limited to non-judiciary rule-makings).

³ Portions of this discussion are adapted and updated from the Pennsylvania State University IST 453 instructor's integrative contributions to the IST 453 class paper: author., Byron Granda, Emily Benoit, Alexander Logan, Ryan Snell & author, *The Federal Rules Of Civil Procedure: Politics In The 2013-2014 Revision*, CONFERENCE ON DIGITAL FORENSICS SECURITY AND LAW, Richmond VA May 29, 2014.

justice vs. confidential privacy. This is a classic tension in law, politics, business, personal liberty and all information sciences and technologies.

Transparency Leads to Justice

First, the forces of transparency seek to improve justice by requiring professionalism among litigators from the practicing bar. Transparency inculcates the values of honesty and forthrightness by requiring evidence be provided to the opposition when relevant to the dispute irrespective of its source, current residence or its ultimate implications. The natural incentive is to hide and destroy deservedly discrediting information.⁴ Throughout most of history in the 20th and now the 21st centuries, the U.S. has witnessed progress by these forces seeking transparency to secure a gradual opening of data sources, now predominately electronically stored information (ESI), achieving transparency that contributes to justice.

Privacy and Confidentiality - Essential to Liberty

Second, the forces of confidentiality and privacy are largely fighting a rear-guard action by resisting openness, touting the historic advantages of confidentiality and lauding the liberty inherent in strong privacy rights. This opposition may be one side of a critical balance in 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 are sometimes unjust.⁵

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. Fabrication, forgery, fraud and perjury persist independently. As the U.S. colonies moved towards independence, many of these practices were regularly used by the British Crown, thus inspiring the liberty reforms inherent in the U.S. Constitution, but particularly in the Bill of Rights.

The U.S. system balances 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 from the Constitution or enacted by the states;⁶ and (6) the 14th Amendment provides a strong basis to withhold or limit access to information, including the freedom of personal choice.⁷

Few other 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.'s phenomenal success in short existence over the past two centuries. Indeed, nations of the civil law tradition provide for few civil

⁴ Posner, Richard, *LAW AND ECONOMICS* (2d ed. Little Brown 1977).

⁵ See, e.g., *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1015-16 (7th Cir. 2002):

Both Ford and Firestone petitioned for interlocutory review under Fed. R. Civ. P. 23(f)... Aggregating millions of claims on account of multiple products manufactured and sold across more than 10 years makes the case so unwieldy, and the stakes so large, that settlement becomes almost inevitable—and at a price that reflects the risk of a catastrophic judgment as much as, if not more than, the actual merit of the claims.

⁶ U.S.CONST. amend.3, 4, 5, 6, 9, 10

⁷ U.S.CONST. amend. 14.

lawsuits among private parties to access information held by opposing parties.⁸ 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 but justice is ultimately limited by government resources and political cronyism/favoritism.

In the 20th century, pre-trial discovery has grown significantly in the U.S. creating unique default rules that all parties in regulatory and private civil litigation must search for, find, produce and disclose to the opposition most all relevant data in their possession. Only attorney-client privilege, attorney work product privilege, grand jury secrecy and various protective orders (e.g., to maintain trade secrecy) are exceptions to the broad discovery rules that the U.S. developed in the 20th century.

The major 1938 amendments to the 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. It has caused consternation and dissonance by opposing parties who appear to lose cases from what appears as self-incrimination. The states eventually follow the FRCP lead, but with some major exceptions.

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 (ESI) has become a watershed. Both the volume and complexity of their production as well as their high probative value have been transformative. After a difficult decade of transition from predominately paper-based records in the early 1990s to predominately ESI in the early 21st century,⁹ the first major reassessment of pre-trial discovery practices produced the 2006 revision of the FRCP. This watershed most clearly signaled the 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 various experts: investigators, computer forensics, electronic discovery (ED) support. Indeed, interdisciplinary electronic discovery teams are necessary to navigate this field successfully.¹⁰ Initially, the federal courts adapted existing paper-based discovery practice to the huge new costs and potential successes of electronic discovery, 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.

Current FRCP Reform Pressures

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 2006 FRCP revisions have worked much better than the piecemeal adaptations made by (largely) a few tech-savvy federal judges in the decade prior,¹¹ there

⁸ In many civil law nations, the criminal prosecutors have inquisitorial powers and also serve as judges. While this provides a modicum of arguable political independence, it clearly violates U.S.-style separation of powers. Civil law nations lack the additional discipline of private attorneys general from private rights of action thereby providing wrongdoers with very considerable “cover.” This may explain most other nations’ reticence to expand U.S.-style private rights of action (civil damages, equitable remedies).

⁹ Ponemon Study (1995).

¹⁰ See generally, Ruhnka, John C. & author, *Using ESI Discovery Teams to Manage Discovery of Electronic Data*, Comm. of the ACM (July 2010) at 142-44.

¹¹ Eight related *Zubulake* decisions were issued between 2003 and 2005: *Zubulake v. UBS Warburg*, 217 F.R.D. 309 (S.D.N.Y. 2003) (Zubulake I: allocating discovery costs for email production from backup tapes); *Zubulake v. UBS Warburg*, No. 02 Civ. 1243, 2003 WL 21087136 (S.D.N.Y. May 13, 2003) (Zubulake II: Zubulake’s reporting obligations); *Zubulake v. UBS Warburg*, 216 F.R.D. 280 (S.D.N.Y. 2003) (Zubulake III: allocating costs between parties for restoration of email backup tapes), *Zubulake v. UBS Warburg*, 220 F.R.D. 212 (S.D.N.Y. 2003) (Zubulake IV: duty to preserve emails; defendant bears plaintiff’s re-deposition costs); *Zubulake v. UBS Warburg*,

are continuing complaints that eDiscovery is still too costly, time consuming and susceptible to misuse in civil and regulatory litigation. This FRCP revision witnessed a convergence between electronic discovery 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.¹²

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.

FRCP Revision – a Non-Standard Political Process

The following succinctly captures how the unique Federal Rules revision process attempts to avoid politicization.

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. ... The development and approval process for court rules differs from traditional legislation by Congress and the President in some significant ways.¹³

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.”¹⁴

The Judicial Conference Advisory Committees on Bankruptcy and Civil Rules of the United States Courts published a preliminary draft of proposed FRCP revisions.¹⁵ Public hearings were held in Washington DC on November 7, 2013, and in Phoenix, Arizona 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. Op-ed writers and expert commentary on the pressures for reform as well as assessments of the revision drafts proliferated in 2013 – 2014, created an interesting political duel over this essential public policy matter as resolved in this non-standard policy-making procedure.

2004 WL 1620866 (S.D.N.Y. July 20, 2004) (Zubulake V: sanctions granted; UBS ordered to pay costs; defense counsel ordered to monitor compliance and preserve with a litigation hold); *Zubulake v. UBS Warburg*, 231 F.R.D. 159 (S.D.N.Y. Feb.2, 2005) (Zubulake Va); *Zubulake v. UBS Warburg*, 382 F.Supp.2d 536 (S.D.N.Y. March 20, 2005) (Zubulake VI: preventing admission of various evidence); and *Zubulake v. UBS Warburg*, 02-CV-1243 (April 6, 2005) (Zubulake jury verdict: \$29.3 million in damages of which \$9.1 million compensatory, nearly \$20.2 million punitive discovery sanctions).

¹² 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/

¹³ Shaffer, Craig B. & Ryan T. Shaffer, *Looking Past The Debate: Proposed Revisions To The Federal Rules Of Civil Procedure*, 7 FED.CT.L.REV. 178 (2013) accessible at: <http://www.fclr.org/fclr/articles/html/2010/Shaffer2.pdf>

¹⁴ 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>

¹⁵ *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>

The Major Issues in the 2014 Revision Effort

The way the FRCP change is a slow and deliberate procedure. In June 2013, the Judicial Conference Advisory Committee on Civil Rules published their proposal. The public comment period opened August 15, 2013 and remained so until February 18, 2014. After three public hearings were held, and 2,359 comments were received, the Committee on Rules of Practice and Procedure approved the revisions at its May 29-30, 2014 meeting. These were then approved by the Judicial Conference of the United States on September 16, 2014. At this time, the revisions are pending before the Supreme Court and, if adopted, could go into effect on December 1, 2015.¹⁶

Some of the more relevant proposals which will affect day to day litigation practices are as follows:

- Reduction of the time to serve summons and complaint from 120 to 60 days;
- Modification of the time within which the scheduling order must issue to within 60 days after any defendant being served (from 120), or within 45 days of any defendant appearing (from 90);
- Requiring actual conference if scheduling order to be issued without Rule 26(f) report, no email, etc.;
- Modifications to Rule 37 to make sanctions harder to impose for good faith preservation/destruction;
- Allowing Rule 34 requests to be made before Rule 26(f) conference but without starting time to respond until after Rule 26(f) conference;
- Changing proportionality from something the court limits to only allowing discovery proportional to needs of the case. (scope under Rule 26(b)(1));
- Making allocation of expenses explicit (FRCP 26(c)(1) (B)); and
- Decreasing limits on depositions, interrogatories and making a limit on requests for admission.¹⁷

Several major issues are presented by the FRCP revision effort, including at least the following, some of which are explored in greater detail in the next sections.

- Political Pressures, the interests and influences of constituencies;
- Mandating Proportionality
- Effectiveness of Limiting Discovery Tools
- Changes in Sanctions for Failure to Preserve ESI

Political Pressure

From 2007 to 2013, experience with the 2006 FRCP revisions precipitated critique and support that evolved into political pressure for and against reform. Reform advocates advanced several arguments including that the high cost of electronic discovery produces injustice; the increasing volume of discovery is not effectively or efficiently processed leading to increasing litigation delay, also producing injustice; these costs and delays accumulate into settlement pressure that makes electronic discovery highly susceptible to misuse; and the scope of electronic discovery has grown too broad.

Countervailing political pressures seek to preserve the status quo or expand the scope of electronic discovery. Predictably, the plaintiff's bar and some academics¹⁸ are among those challenging

¹⁶ See generally, Lathrop, Tony, Proposed Amendments to Federal Rules of Civil Procedure Governing Discovery and Preservation of Electronically Stored Information One Step Closer to Approval, JD Supra Bus.Advisor (Oct.27, 2014) accessible at: <http://www.jdsupra.com/legalnews/proposed-amendments-to-federal-rules-of-11494/> and Lange, Michele, Part III – FRCP Amendments: The Long and Winding Road, JDSupra Bus.Advisor (Oct.8, 2014) accessible at: <http://www.jdsupra.com/legalnews/part-iii-frcp-amendments-the-long-and-77997/>.

Here are the two most recent Judicial Conference Reports, of course, Rule 26 is only a small part of these:
<http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2014.pdf>
<http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2014-add.pdf>

¹⁷ Id.

¹⁸ See generally Comment by Hershkoff, Helen, Lonny Hoffman, Alexander A. Reinert, Elizabeth M.

the reform effort.¹⁹ First, they argue that electronic discovery costs are overstated. Second, they argue that the misuse of discovery is a recurring but unsubstantiated allegation generally. Furthermore, adequate disincentives arise from existing rules addressing discovery sanctions and the accumulating experience in discovery sanctions. Finally, the sweeping reforms proposed would impose constraints that would actually increase the costs of achieving justice.

Predictably, the defense bar, the insurance lobby and deep pocket defendants are the most active in filing pro-reform comments with the Judicial Conference. Consistent with decades-old arguments for regulatory reform, litigation reform, product liability reform and tort reform, the 2013-2014 FRCP revision pressures promise direct and opportunity cost savings.²⁰ According to the RAND Institute for Civil Justice, document review consumes an inordinate proportion of electronic discovery costs although innovations such as predictive coding show promise to control these costs.²¹

Mandating Proportionality

The proposals reduce the scope of discovery at several levels, including what may be obtained (incorporating proportionality explicitly) and how it may be obtained (limits on discovery tools). Proportionality was addressed through FRCP 26(b)(1). The changes make explicit that discovery shall only be “proportional to needs of the case,” thereby limiting the scope of discovery. More specifically, it further refines the definition of “proportional” by stating: “it is the amount of controversy, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.” The changes also specify that expenses are to be allocated more equitably.

Critics, of course, dislike these changes. Plaintiffs believe it will now be harder to obtain discovery. The defense bar generally welcomes the changes as some believe that discovery, especially eDiscovery, is abused by the plaintiff’s bar, causing defendants unnecessary expense.

Changes to make discovery proportional have been coming for quite some time. Experience tells us that the costs of ediscovery had become so high that courts were *sua sponte* limiting it to decrease litigation costs and to retain the integrity of the process. With a single hard drive capable of containing more than 400,000 elements, there is an incredible amount of data to be examined in routine cases. Changes in the proportionality concepts within the FRCP are believed to be necessary so as to avoid rendering eDiscovery so expensive that the merits of a case become secondary to eDiscovery costs.

Effectiveness of Limiting Discovery Tools

The changes propose decreasing the limits on depositions and interrogatories, as well as setting a limit on requests for admission. This would be accomplished by changing Rules 30, 31, 33 and 36. The proposals would reduce the number of depositions taken in an action from 10 to 5, and deposition time limits would be reduced from 7 hours each to 6. Under the proposed changes, interrogatories would decrease from 25 to 15. Requests for admission would be limited to 25.

The proposals themselves were not meant to decrease discovery but, rather, make it more efficient. The Committee, in formulating the proposed changes, specifically referenced the idea that a court always may allow more discovery upon “good cause” shown. Thus, it appears the discovery tool limitations are meant to shift the start of the discussion.

Again, critics and proponents split along plaintiff and defense lines. Critics argue that these limitations will make it harder for a plaintiff to prove his case. The defense bar welcomes them, believing that discovery currently is too expansive. The truth likely lies somewhere in between. Nonetheless, there

Schneider, David L. Shapiro, & Adam N. Steinman, *accessible at* Regulation.gov

¹⁹ See generally, Fax, Charles X, *Proposed Changes to Federal Rules Prompt Pushback*. LITIGATION NEWS (Am. Bar Assn.), 2014. Web. 28 Apr. 2014 *accessible at*:

http://apps.americanbar.org/litigation/litigationnews/civil_procedure/041614-pushback-federal-rules.html

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

²¹ Pace, Nicholas & M. Laura Zakaras, *WHERE THE MONEY GOES: UNDERSTANDING LITIGANT EXPENDITURES FOR PRODUCING ELECTRONIC DISCOVERY* (RAND Institute for civil Justice, 2012) *accessible at*: <http://www.rand.org/pubs/monographs/MG1208.html>

is a compelling argument to be made that litigation may not be more efficient in the face of these limitations if the result is an increase in discovery disputes and motions.

Changes in Sanctions For Failing to Preserve ESI

There is significant change coming if the proposal with regard to the safe harbor provision of FRCP 37 stands. Currently, Rule 37(e) reads, “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.”²² The Committee now proposes that sanctions may be imposed for failing to preserve discoverable information “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.”²³

There are numerous critics to these particular changes. Some believe that the new language is so ambiguous and undefined that it fails to provide meaningful standards for judges considering imposition of sanctions. Noted eDiscovery scholar and United States District Court Judge Shira Scheindlin of the Southern District of New York stated her objections to these changes in a letter to the Committee, “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.”²⁴ In her testimony, Judge Scheindlin also stated that the vagueness will not encourage parties to preserve ESI.

The defense bar fears that they may be sanctioned more often because of ambiguity regarding when preservation of ESI is required. That fear also stems from concern that plaintiffs more frequently will seek sanctions, even in instances where there is no clear evidence of malicious intent to destroy ES, with hopes that the court will impose same in light of the ambiguous Rule language.

Reflections on the Virginia Perspective

The Virginia Supreme Court is tasked with promulgating the rules of procedure in the Virginia courts. See Va. Code § 8.01-3(A) (“The Supreme Court, subject to §§ 17.1-503 and 16.1-69.32, may, from time to time, prescribe the forms of writs and make general regulations for the practice in all courts of the Commonwealth; and may prepare a system of rules of practice and a system of pleading and the forms of process and may prepare rules of evidence to be used in all such courts.”); see also Va. Const. art. VI, § 6 (“The Supreme Court shall have the authority to make rules governing the course of appeals and the practice and procedures to be used in the courts of the Commonwealth, but such rules shall not be in conflict with the general law as the same shall, from time to time, be established by the General Assembly.”).

The emergence of civil discovery issues involving ESI was intended to be addressed, in part, by the 2013 amendments to the FRCP. The Virginia Supreme Court previously had addressed some of these issues in its civil rule additions and amendments that went into effect January 1, 2009.²⁵ Specifically, the Virginia Supreme Court enacted Rules 4:1(b)(6)(ii), 4:1(b)(7), and 4:9A and amended Rule 4:9 in part to address ESI discovery issues. A discussion of these additions and amendments and a comparison with the analogous Federal Rules follows.

Virginia Rule 4:1(b)(6)(ii)

Subpart (ii) of this Rule provides a protocol for handling the inadvertent production of materials, including ESI, that a producing party believes to be confidential or privileged. Pursuant to this protocol,

²² Fed. R. Civ. P. 37(e).

²³ See *infra* at n. 15.

²⁴ Scheindlin, Shira, Comments on Proposed Rules-Letter to Committee on Rules of Practice and Procedure, Regulations.gov (Jan. 13, 2014).

²⁵ Notably, Bob Goodlatte, a member of the United States House of Representatives for Virginia’s 6th Congressional District, is the Chair of the 113th Congressional Committee on the Judiciary, which promulgated the subject Federal Rule amendments. The similarities in the language of the amended Virginia and Federal Rules discussed herein suggest that the 2013 Federal Rule amendments may have been influenced, at least in part, by the 2009 changes in the analogous Virginia Rules.

the producing party is required to notify any other party of the production of said materials and to identify the basis for the claimed privilege or protection. Thereafter, the receiving party *must* sequester or destroy the materials and *shall not* duplicate or disseminate the materials pending disposition of the claim of privilege or protection, either upon agreement of the parties or by motion. If the receiving party disseminated the subject materials prior to receiving notice from the producing party, the receiving party *must* take reasonable steps to retrieve the designated material. The Rule requires the producing party to preserve the materials until the claim of privilege or other protection is resolved.

Although this Rule essentially mirrors FRCP 26(b)(5)(B), albeit with a few minor exceptions, the Federal Rule does not specifically reference ESI as does the Virginia Rule. FRCP 45(e)(2)(B), which was subject to the 2013 amendments, contains a similar provision; however, this Rule pertains specifically to materials produced in response to subpoena, as opposed to materials produced in the ordinary course of discovery, such as through a request for production.

FRCP is substantively analogous to Virginia Rule 4:1(b)(6)(ii) with the exception of three relatively minor distinctions: (1) The Federal Rule requires that, upon notice of the inadvertent production, the receiving party must “return, sequester, or destroy” the materials, whereas the Virginia Rule mandates that the receiving party must either “sequester or destroy” the materials (there is no option to “return” the materials); (2) the Federal Rule prohibits the receiving party from using or disclosing the subject materials until the dispute is resolved, whereas the Virginia Rule prohibits the receiving party only from duplicating or disseminating the materials (there is no prohibition on otherwise “using” the materials); and (3) the Federal Rule specifies that the receiving party may present the subject materials under seal to the court for the district where compliance is required for a determination of the claim, whereas the Virginia Rule does not contain an analogous provision.

Virginia Rule 4:1(b)(7)

Subpart (b)(7) of this Rule governs the procedure by which a party may refuse to produce ESI that the party has identified as not reasonably accessible due to undue burden or cost. Pursuant to this procedure, a party is not required to produce any such identified ESI, although the party bears the burden of establishing that the ESI is not accessible due to undue burden or cost, either in support of the party’s motion for protective order or in response to an opposing party’s motion to compel. In addition, even if the party objecting to production of ESI meets its burden of inaccessibility, the court may still order the discovery if the requesting party shows good cause, considering the limits on the scope of discovery as provided for in Rule 4:1(b)(1).²⁶ If the court compels production of ESI, it may specify the conditions for the production, including allocation of the reasonable costs thereof.

This Rule mirrors FRCP 26(b)(2)(B), and there are no significant distinctions between the two rules. FRCP 45(e)(1)(D), which was subject to the 2013 amendments, contains a similar provision; however, this Rule pertains specifically to materials produced in response to subpoena, as opposed to materials produced in the ordinary course of discovery, such as through a request for production.

Virginia Rule 4:9

This Rule governs the production of documents during discovery, including the production of ESI. Subpart (b)(iii)(B) pertains specifically to ESI production. Rule 4:9(b)(iii)(B)(1) mandates that responses to a request for production of ESI shall be subject to the provisions of Rules 4:1(b)(7) (allowing non-production of ESI upon a showing of inaccessibility due to undue burden or cost) and 4:1(b)(8) (requiring a pre-motion certification of good faith attempts to resolve matter without court intervention). In addition, subpart (b)(iii)(B)(2) provides that in the event a request does not specify the form for production of the ESI, or if the requested form is objected to by the producing party, the producing party *must* produce the information as it is ordinarily maintained if it is reasonably usable in such form, or must produce it in another form that is reasonably usable. The producing party is not required to produce requested ESI in more than one form.

This Rule is similar to FRCP 34, specifically subparts (b)(2)(D) and (b)(2)(E). Subpart (b)(2)(D) of FRCP 34 provides that the producing party may object to the requesting party’s specified form of ESI

²⁶ This Rule governs the discovery methods and general scope of discovery in civil actions.

production. In the event the producing party so objects, or in the event the requesting party fails to specify a form of production, the producing party *must* state the form it intends to use for the production. This provision is not specifically set forth in the analogous Virginia rule, although the Virginia rule does allow a producing party to object to the form of production specified by the requesting party. *See* Va. Sup. Ct. R. 4:9(b)(iii)(B)(2). Subpart (b)(2)(E)(i) of FRCP 34 provides that a producing party *must* produce documents, including ESI, as they are kept in the usual course of business, or, alternatively, *must* organize and label the documents to correspond to the categories indicated in the request. This provision does not appear in the analogous Virginia rule pertaining specifically to production of ESI. Rather, this provision is set forth in Virginia Rule 4:9(b)(iii)(A), which governs production of documents generally and does not reference production of ESI. Subpart (b)(2)(E)(ii) of FRCP 34 provides that, if the requesting party fails to specify a form for ESI production, the producing party *must* produce it in a form in which it is reasonably maintained or in a reasonably usable form. This is similar to the Virginia rule, although the Virginia rule includes the caveat that the producing party must produce the ESI in the form in which it is ordinarily maintained *if it is reasonably usable in such form*. *See* Va. Sup. Ct. R. 4:9(b)(iii)(B)(2). There is no such caveat in the Federal Rule. Finally, subpart (b)(2)(E)(iii) of Federal Rule 34 provides that a producing party is not required to produce ESI in more than one form. This mirrors the analogous provision of the Virginia rule. *See* Va. Sup. Ct. R. 4:9(b)(iii)(B)(2).

Virginia Rule 4:9A

This Rule governs the production of documents and ESI from non-parties. Specifically, subpart (c)(2) pertains to the production of ESI by non-parties pursuant to subpoena. Rule 4:9A(c)(2)(A) mirrors the provisions of Rule 4:1(b)(7), discussed above, regarding the non-production of ESI that a producing party establishes to be inaccessible due to undue burden or cost. Rule 4:9A(c)(2)(B) mirrors the provisions of Rule 4:9(b)(iii)(B)(2), discussed above, regarding the form of ESI production by the producing party when the requesting party fails to specify any such form or when the form specified is objectionable. Rule 4:9A(c)(3) provides that, upon motion, the court may quash or modify the subpoena or the method or form of ESI production if the subpoena would otherwise be unduly burdensome or expensive. This Rule also permits the court to condition its denial of a motion to quash or modify a subpoena on the advancement of production costs by the appropriate party. This Rule further permits the court to order that the materials subpoenaed, including ESI, be submitted to the office of the court clerk and only be withdrawn upon request for a reasonable period of time to allow for inspection, photographing or copying of the materials. Rule 4:9A(c)(4) requires a party bringing a motion under this Rule to include a certification that the party attempted in good faith to resolve the matter with the other affected parties without court intervention. Finally, Rule 4:9A(f)(2) pertains to the production of ESI in response to subpoena, and it provides that when a party to a civil proceeding receives ESI in response to a subpoena, that party *shall*, if requested, provide complete and accurate copies of the ESI to the requesting parties in the same form it was received and upon reimbursement of the proportionate costs of obtaining the ESI.

This Rule is similar to FRCP 45, specifically subparts (d)(3) and (e) governing the procedures for having a subpoena quashed or modified and the requirements for responding to a subpoena. Subpart (d)(3) of the Federal Rule is similar to subpart (c)(3) of the Virginia Rule and *requires* a court, upon motion, to quash or modify a subpoena that meets any of the following criteria: (1) failure to allow a reasonable compliance timeframe; (2) requires a person to respond outside the geographical limits set forth in FRCP 45(c); (3) requires disclosure of privilege or otherwise protected information assuming no applicable exception or waiver; or (4) subjects a person to undue burden. Subpart (d)(3) of the Federal Rule also sets forth the criteria under which a court *may* quash or modify a subpoena: (1) requires disclosure of a trade secret or other confidential research, development or commercial information; or (2) requires disclosure of an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party. FRCP 45 is more detailed than the Virginia Rule with respect to the circumstances under which a court must quash or modify a subpoena, as well as with respect to the circumstances under which a court has discretionary authority to quash or modify a subpoena. As with Virginia Rule 4:9A(c)(3), FRCP 45(d)(3) also provides

courts with the ability to fashion alternative remedies for resolving subpoena disputes and provides that a court *may*, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the following criteria are met by the serving party: (1) a showing of substantial need for the testimony or material that cannot be met without undue hardship; and (2) assurance that the subpoenaed individual will be reasonably compensated. Again, this provision of the Federal Rule is more detailed and specific than its Virginia counterpart.

Subparts (e)(1)(B) and (e)(1)(C) of FRCP 45 essentially mirror Virginia Rule 4:9A(c)(2)(B), discussed above, regarding the form for producing ESI when the form is not specified by the requesting party, as well as providing that the producing party is not required to produce ESI in more than one form. Subpart (e)(1)(D) of FRCP 45 mirrors Virginia Rule 4:9A(c)(2)(A), discussed above, regarding the non-production of ESI that a producing party establishes to be inaccessible due to undue burden or cost.

Conclusion

It is never easy to digest potential changes as the process of their transformation continues. However, some modifications have such implications that a wait-and-see approach will not suffice. This piece discusses significant changes to the FRCP that have great potential effect not only on the Federal litigation process, but also on corresponding Virginia Supreme Court Rules, which parallel most of the FRCP.

First, cooperation is heavily incentivized. Changes to FRCP 1 were not subsequently revised making cooperation among the parties and the court to encourage “just, speedy, and inexpensive” resolution.²⁷ Second, proportionality principles are reinforced, consistent with case law and the stronger principled advocacy leading to and expressed throughout the revision process. Under revised Rule 26(b)(1), judges are encouraged to balance several factors:

Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible 18 in evidence to be discoverable.

Third, responding to overwhelming public pressures, the presumptive limits on depositions, interrogatories and admissions were withdrawn. This strongly illustrates the responsiveness of the Standing Committee as well as its parent, the Judicial Conference, to the comments of the public and to rulemaking witnesses. Finally, spoliation and ESI preservation case law are now better reconciled under a national standard while preserving judicial discretion to address an ever expanding volume of ESI. Sanctions are generally proper on findings the party acted willfully or in bad faith and the ESI destruction caused “substantial prejudice” to the opposing party. Sanctions for negligent ESI destruction (absent willful or bad faith) are permissible only when the loss irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation and only if the affected claim or defense was central to the litigation.

At this stage of the proceedings, it appears that those suggesting changes are intent on implementing new and different procedures in the name of judicial efficiency. The proposed changes appear likely to impose greater consequences on plaintiffs than on defendants. However, the process itself is ongoing. Only time will tell what changes will be part of the final package, and thereby, what implications will arise from their inclusion.

²⁷ Reikes, John, Why Even the Most Cutthroat Lawyer Should Want to Cooperate, Ediscovery Blog (Sept. 25, 2014) *accessible at*: <http://www.theediscoveryblog.com/2014/09/25/even-cutthroat-lawyer-want-cooperate/>