

Notes: To address the suggestion at the last CJRC meeting that there should be some defined instances where Rule 11 sanctions are mandatory, the draft below has been modified to add several defined categories of mandatory sanctions. The Work Group does not unanimously support these changes. We would like Committee input on the basic approach and, if there is support for trying to define mandatory sanction categories, what those categories should be.

Rule 11. Signing Pleadings, Motions, and Other Documents; Representations to the Court; Sanctions; Assisting Filing by Self-Represented Person

(a) Signature

- (1) **Generally.** Every pleading, written motion, and other document filed with the court or served must be signed by at least one attorney of record in the attorney’s name— or by a party personally if the party is unrepresented. The court must strike an unsigned document unless the omission is promptly corrected after being called to the filer’s attention.
- (2) **Electronic Filings.** A person may sign an electronically filed document by placing the symbol “/s/” on the signature line above the person’s name. An electronic signature has the same force and effect as a signature on a document that is not filed electronically. The court may treat a document that was filed using a person’s electronic filing registration information as a filing that was made or authorized by that person.
- (3) **Filings by Multiple Parties.** A person filing a document containing more than one place for a signature—such as a stipulation—may sign on behalf of another party only if the person has actual authority to do so. The person may indicate such authority either by attaching a document confirming that authority and containing the signatures of the other persons who have authority to consent for such parties, or, after obtaining a party’s consent, by inserting “/s/ [the other party’s or person’s name] with permission” as any non-filing party’s signature.

(b) Representations to the Court. By signing a pleading, motion, or other document, the attorney or party certifies that to the best of the person’s knowledge, information, and belief formed after reasonable inquiry:

- (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

- (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
- (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
- (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

(c) **Sanctions.**

- (1) **Generally.** If a pleading, motion, or other document is signed in violation of this rule, the court—on motion or on its own:

(A) must impose on the person who signed it, a represented party, or both, an appropriate sanction [that must include an order to pay to the other party or parties the amount of reasonable expenses incurred because of the filing of the document, including a reasonable attorney’s fee,] if the court finds that:

(i) the document was presented for an improper purpose in violation of Rule 11(b)(1);

(ii) the person against whom sanctions are requested failed to participate in the consultation required under Rule 11(c)(2) despite having a reasonable opportunity to do so;

(iii) [possible “serial filer” protection, something along the lines of the following: “the person against whom sanctions are requested has filed one or more other actions against the person seeking sanctions in the 12 months before the document was signed, in sanctions were awarded under Rule 11 or A.R.S. § 12-349, or the court dismissed the action(s) under Rule 12(b)(6) for failure to state a claim.]; or

(iv) [the document contains allegations that would be defamatory but for the fact they were alleged in a pleading, motion or other document, and were known by the signer to be false at the time the allegations were made.]

(B) for conduct not requiring mandatory sanctions under Rule 11(c)(1)(A), —may impose on the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including a reasonable attorney’s fee.

(2) **Consultation.** Before filing a motion for sanctions under this rule, the moving party must:

- (A) attempt to resolve the matter by good faith consultation as provided in Rule 7.1(h); and
- (B) if the matter is not satisfactorily resolved by consultation, serve the opposing party with written notice of the specific conduct that allegedly violates Rule 11(b). If the opposing party does not withdraw or appropriately correct the alleged violation(s) within 10 days after the written notice is served, the moving party may file a motion under Rule 11(c)(3).

(3) **Motion for Sanctions.** A motion for sanctions under this rule must:

- (A) be made separately from any other motion;
- (B) describe the specific conduct that allegedly violates Rule 11(b);
- (C) be accompanied by a Rule 7.1(h) good faith consultation certificate; and
- (D) attach a copy of the written notice provided to the opposing party under Rule 11(c)(2)(B).

(d) **Assisting Filing by Self-Represented Person.** An attorney may help draft a pleading, motion, or other document filed by an otherwise self-represented person, and the attorney need not sign that pleading, motion, or other document. In providing such drafting assistance, the attorney may rely on the otherwise self-represented person's representation of facts, unless the attorney has reason to believe that such representations are false or materially insufficient, in which case the attorney must make an independent reasonable inquiry into the facts.

Proposed Revisions to Rules Governing Expert Disclosures/Reports:

(1) The work group proposes changes to Rules 16 and 26.1 to provide a framework for determining whether an expert report should be required based on the anticipated nature of the testimony. The idea is that expert reports should not be required in all cases, but that there are some types of cases where they should be presumptively required, if the testimony is “scientific” in nature (with the exact phrasing/scope open to discussion/debate). The framework proposed requires parties to confer about the form of expert disclosures early in the case, and provides an expedited procedure for resolving disputes. The structure of the revised Rule 26.1 loosely follows that of the federal rule, which has separate subdivisions addressing the requirements for experts who must provide a report, and experts who need not provide a report. The work group does not favor mandating expert reports in all (or even some) cases, based on cost concerns. The rule as proposed provides some flexibility to parties and the court in deciding whether a report should be required in a particular case.

(2) The disclosure requirements have been modified to require the following disclosures in all cases: (a) the expert’s past testimony; (b) publications; and (c) the basis of the expert’s compensation.

(3) The draft revises Rule 26(b)(4) to incorporate provisions of Federal Rule 26(b)(4)(B) and (C), which protect drafts of expert reports, and communications between counsel and experts (with some exceptions).

Rule 16. Scheduling and Management of Actions

(b) Joint Report and Proposed Scheduling Order

(2) *Conference of the Parties.* No later than 60 days after any defendant has filed an answer to the complaint or 180 days after the action commences—whichever occurs first—the parties must confer regarding the subjects set forth in Rule 16(d).

(3) ***Filing of Joint Report and Proposed Scheduling Order.*** No later than 14 days after the parties confer under Rule 16(b)(2), they must file a Joint Report and a Proposed Scheduling Order with the court stating—to the extent practicable—their positions on the subjects set forth in Rule 16(d) and proposing a Scheduling Order that specifies deadlines for the following by calendar date, month, and year:

- (A) serving initial disclosures under Rule 26.1 if they have not already been served;
- (B) identifying areas of expert testimony, including, to the extent then known, whether any party anticipates disclosing an expert witness whose testimony will involve the application of [scientific][medical, engineering, or mathematical] principles or methods;
- (C) identifying and disclosing expert witnesses and their opinions under Rule 26.1(a)(6);

(4) ***Requirements of Joint Report and Proposed Scheduling Order.*** *** The Joint Report must certify that the parties conferred regarding the subjects set forth in Rule 16(d). ***

(d) **Scheduling Conferences in Non-Medical Malpractice Actions.** Except in medical malpractice actions, on a party's written request the court must—or on its own the court may—set a Scheduling Conference. At any Scheduling Conference under this Rule 16(d), the court may:

- (4) determine a schedule for disclosing expert witnesses;
- (5) determine the form of expert disclosures, including whether a signed expert report should be required for any expert whose testimony is expected to involve the application of [scientific][medical, engineering, or mathematical] principles or methods.

Rule 26. General Provisions Governing Discovery

(b) Discovery Scope and Limits.

(3) *Work Product and Witness Statements.*

(A) *Documents and Tangible Things Prepared in Anticipation of Litigation or for Trial.* Ordinarily, a party may not discover documents and tangible things that another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) prepared in anticipation of litigation or for trial. But, subject to Rule 26(b)(4)(B), a party may discover those materials if:

[provisions re: substantial need omitted]

(B) *Protection Against Disclosure of Opinion Work Product.* If the court orders discovery of materials under Rule 26(b)(3)(A), it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(4) *Expert Discovery.*¹

(A) *Deposition of an Expert Who May Testify.* A party may depose any person who has been disclosed as an expert witness under Rule 26.1(a)(6).

(B) *Trial-Preparation Protection for Draft Reports or Disclosures.* Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26.1(c), regardless of the form in which the draft is recorded.

(C) *Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses.* Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report or for whom a disclosure is required under Rule 26.1(c), regardless of the form of the communications, except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

¹ Proposed changes track Federal Rule 26(b)(4).

(D) *Expert Employed Only for Trial Preparation.* Ordinarily, a party may not discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial. A party may discover such facts or opinions only:

- (i) as provided in Rule 35(d); or
- (ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(E) *Payment.* Unless manifest injustice would result, the court must require that the party seeking discovery:

- (i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (B), including the time the expert spends testifying in a deposition; and
- (ii) for discovery under Rule 26(b)(4)(B), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions, including—in the court's discretion—the time the expert reasonably spends preparing for deposition.

(F) *Number of Experts Per Issue.*

- (i) *Generally.* Unless the parties agree or the court orders otherwise for good cause, each side is presumptively entitled to call only one retained or specially employed expert to testify on an issue. When there are multiple parties on a side and those parties cannot agree on which expert to call on an issue, the court may designate the expert to be called or, for good cause, allow more than one expert to be called.
- (ii) *Standard-of-Care Experts in Medical Malpractice Actions.* Notwithstanding the limits of Rule 26(b)(4)(D)(i), a defendant in a medical malpractice action may—in addition to that defendant's standard-of-care expert witness—testify on the issue of that defendant's standard of care. In such an instance, the court is not required to allow the plaintiff an additional expert witness on the issue of the standard of care.

Rule 26.1. Prompt Disclosure of Information

(a) **Duty to Disclose; Disclosure Categories.** Within the times set forth in Rule 26.1(d) or in a Scheduling Order or Case Management Order, each party must disclose in writing and serve on all other parties a disclosure statement setting forth:

(6) ~~the anticipated subject areas of expert testimony, including, to the extent then known, whether the party anticipates disclosing an expert witness whose testimony will involve the application of [scientific] [medical, engineering, or mathematical] principles or methods]; name and address of each person whom the disclosing party expects to call as an expert witness at trial, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, a summary of the grounds for each opinion, the expert's qualifications, and the name and address of the custodian of copies of any reports prepared by the expert;~~

*** [b. contains new Task Force proposal addressing staggered disclosure of ESI and providing a dispute resolution procedure]

(c) **Disclosure of Expert Testimony.**²

(1) In General. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Rules 702, 703, or 705.

(2) Duty to Confer on Form of Expert Disclosures. To the extent not already stipulated to or ordered in the action, promptly on receiving initial disclosures under Rule 26.1(a), the parties must confer and attempt to agree on the form of expert disclosures. Ordinarily, an expert report should be provided for any expert whose testimony is expected to involve the application of [scientific] [medical, engineering, or mathematical] principles or methods. Any dispute regarding the form of expert disclosures must be presented to the court in a single joint motion and must be accompanied by a Rule 7.1(h) certificate. In determining whether an expert report should be required over the objection of a party, the court should consider the factors set forth in [Rule 26(b)(1)(B(iv))].³

² The structure has been modified from the current rule and is similar to the structure of federal rule 26(a)(2).

(2) *Expert Witnesses Who Do Not Provide a Written Report.* Unless otherwise stipulated or ordered by the court, if an expert witness is not required to provide a written report, the disclosure must state:

- (A) the expert's name and address;
- (B) the subject matter on which the expert is expected to testify;
- (C) the substance of the facts and opinions to which the expert is expected to testify;
- (D) a summary of the grounds for each opinion.
- (E) the expert's qualifications, including a list of all publications authored in the previous 10 years;
- (F) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
- (G) a statement of the compensation to be paid for the study and testimony in the case.

(3) *Expert Witnesses Who Must Provide a Written Report.* If the parties stipulate or the court orders that expert disclosures must be accompanied by a signed written report, in addition to the disclosures required by Rule 26.1(c)(2)(E), (F), and (G), the report must contain:⁴

- (A) a complete statement of all opinions the witness will express and the basis and reasons for them;
- (B) the facts or data considered by the witness in forming them; and
- (C) any exhibits that will be used to summarize or support them.

(d) Purpose; Scope.

(1) *Purpose.* The purpose of the disclosure requirements of this Rule 26.1 is to ensure that all parties are fairly informed of the facts, legal theories, witnesses, documents, and other information relevant to the action.

(2) *Scope.* A party must include in its disclosures information and data in its possession, custody, and control as well as that which it can ascertain, learn, or acquire by reasonable inquiry and investigation.

[Rest of rule has been omitted]

⁴The required content of the report is based on federal rule 26(a)(2)(B).

Rule X Dispute Resolution Procedures Regarding Preservation of Electronically Stored Information

(a) Generally; Scope. This rule governs the resolution of disputes regarding the scope of a party or nonparty’s duty to preserve electronically stored information. This rule does not govern the obligations of a nonparty to respond to a subpoena seeking the production of electronically stored information under Rule 45.

(b) Definitions. For purposes of this rule:

(1) A “preservation request” is a written notice to a party or nonparty requesting that the nonparty preserve electronically stored information for possible use in pending or anticipated litigation.

(2) A “nonparty” is a person who receives a preservation request under this rule and is not a party to a pending action in which the request is made. The preservation request may, but need not, pertain to anticipated litigation against the nonparty.

(3) A “requestor” is a person who makes a preservation request.

(c) Objections. A party or nonparty receiving a preservation request may serve a written objection on the requestor. Grounds for objection may include[, without limitation,] that there is no duty to preserve electronically stored information under Rule 37(g)(1), or that the requested preservation would impose an undue burden or expense. A party or nonparty does not waive any objection to a preservation request by failing to object in writing under this rule, but the dispute resolution procedures in Rule 45.3(e) only apply if a written objection is served.

(d) Duty to Confer. If a written objection is served, the objecting party or nonparty and the requestor should promptly confer and attempt to reach agreement on the reasonable scope of the party or nonparty’s obligation to preserve electronically stored information, taking into account the limitations of Rule 37(g)(1) and (2).

(e) Dispute Resolution Procedures.

(1) Pending Action. If the parties to a pending action are unable to satisfactorily resolve any dispute regarding the preservation of electronically stored information and seek a resolution from the court, they must present the dispute in a single joint motion. The joint motion must include the parties’ positions and the separate certification from all counsel required under Rule 7.1(h).¹ If a preservation request is made to a nonparty in connection with an action pending in superior court, in addition to the procedures in this rule, the

¹ This procedure is similar to the procedure contained in the Task Force draft for resolving disputes regarding the production of ESI.

nonparty may move for a protective order under Rule 26(c) seeking a determination regarding any obligation to preserve electronically stored information).²

(2) *Verified Petition.* A nonparty may file a verified petition,³ asking the court to determine the existence or scope of any duty to preserve electronically stored information. The petition must be titled “Verified Petition Seeking Rule 45.3 Determination Regarding Preservation of Electronically Stored Information.” Any verified petition:

(A) must be accompanied by a Rule 7.1(h) good faith consultation certificate;

(B) identify, by name and address, the person(s) expected to oppose the petition;

(C) identify with specificity the issues on which the nonparty and the requesting party were unable to reach agreement, and the nonparty’s position on each issue; and

(D) set forth the specific relief requested. If a petitioning nonparty contends that the preservation request would impose an undue burden or expense, it must state the facts supporting that contention and provide an estimate of the expense likely to be incurred.

(3) *Service of Verified Petition; Response.* The verified petition must be served on the requestor in the same manner that a summons and pleading are served under Rule 4, 4.1, or 4.2, as applicable. The requestor must serve and file a response within 20 days after service, except as otherwise provided in Rules 4, 4.1, or 4.2. Unless the court orders otherwise, the petitioner may not file a reply memorandum.

(4) *Hearing and Determination.* The procedures of Rule 7.1(c) and (d) govern proceedings under this rule. The court may issue orders limiting a party or nonparty’s preservation obligation based on the factors set forth in Rules 26(b)(1)(B) and 37(g). If the court finds that preservation would impose an undue burden or expense on a party or nonparty, preservation may be ordered only on such conditions as are just, which may include requiring the requestor to pay some or all of the reasonable costs of preservation. Expenses may be awarded as allowed by Rule 37(a)(5).

(f) *Effect of Order.* A party or nonparty who complies with a preservation order obtained under this rule is deemed to have taken reasonable steps to preserve electronically stored information under Rule 37(g).

(g) *Contractual Limitations on Preservation.* In issuing any order under this rule, the court must give effect to any pre-litigation agreement regarding the preservation of electronically stored information so long as it was freely negotiated and is otherwise enforceable under applicable law.

² We will also need to modify Rule 26(c) to cross reference this rule and provide that its procedures also govern party and nonparty requests for protection re: preservation demands.

³ TBD: In Rule 27 (pre-litigation depositions) the venue is specified as: “the county of the residence of any expected adverse party.” If we are silent, normal venue rules would apply.

[Rule 37 from the Task Force petition is repeated verbatim below, to provide context for the preservation portions of new Rule 26.3]

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

(g) Failure to Preserve Electronically Stored Information

(1) *Duty to Preserve.*

(A) *Generally.* A party or person has a duty to take reasonable steps to preserve electronically stored information relevant to an action once it commences the action, once it learns that it is a party to the action, or once it reasonably anticipates the action's commencement, whichever occurs first. A court order or statute also may impose a duty to preserve certain information.

(B) *Reasonable Anticipation.* A person reasonably anticipates an action's commencement if:

- (i)** it knows or reasonably should know that it is likely to be a defendant in a specific action; or
- (ii)** it seriously contemplates commencing an action or takes specific steps to do so.

(C) *Reasonable Steps to Preserve.*

(i) A party must take reasonable steps to prevent the routine operation of an electronic information system or policy from destroying information that should be preserved.

(ii) Factors that a court should consider in determining whether a party took reasonable steps to preserve relevant electronically stored information include the nature of the issues raised in the action or anticipated action, the information's probative value, the accessibility of the information, the difficulty in preserving the information, whether the information was lost as a result of the good-faith routine operation of an electronic information system, the timeliness of the party's actions, and the relative burdens and costs of a preservation effort in light of the importance of the issues at stake, the parties' resources and technical sophistication, and the amount in controversy.

(2) *Remedies and Sanctions.* If electronically stored information that should have been preserved is lost because a party—either before or after an action's commencement—failed to take reasonable steps to preserve it, a court may order additional discovery to restore or replace it, including, if appropriate, an order under Rule 26(b)(2). If the information cannot be restored or replaced through additional discovery, the court:

- (A) upon finding prejudice to another party from the loss of the information, may order measures no greater than necessary to cure the prejudice; or
- (B) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation, may:
 - (i) presume that the lost information was unfavorable to the party;
 - (ii) instruct the jury that it may or must presume the information was unfavorable to the party; or
 - (iii) upon also finding prejudice to another party, dismiss the action or enter a default judgment.

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