Date: November 13, 2020

To: Advisory Committee on Federal Civil Procedure Rules (Rules Committee_Secretary@ao.uscourts.gov)

From: Professor Emeritus Jeffrey A. Parness, Northern Illinois University College of Law

Re: Proposed Amendment to Rule 27(c)

I write to ask the Committee to consider an amendment to Rule 27(c) which would expand opportunities for presuit discovery orders related to possible later civil actions in federal district courts. The proposed language (underlined) is as follows:

> "This rule does not limit a court's power to entertain an action to perpetuate testimony and an action involving presuit information preservation when necessary to secure the just, speedy, and inexpensive resolution of a possible later federal civil action."

I have included a memorandum in which I outline the rationales and some guidelines for an amended Rule 27(c).

Thanks for the consideration. You can reach me at 815-753-0340 or jparness@niu.edu.

**Proposed Amendment to Federal Civil Procedure Rule 27(c):**
**Federal Presuit Information Preservation Orders**

**Jeffrey A. Parness**[1]

## Introduction

Federal civil procedure laws allowing presuit information preservation orders by district courts should be expanded in order to promote greater uniformity across the country and greater compliance with current substantive and procedural laws on the preservation duties involving civil litigation information. These new laws are best placed in Federal Civil Procedure Rule (FRCP) 27(c). Following are the rationales, some guidelines, and suggested language for a new FRCP 27(c). A Comment accompanying any new rule should indicate its justification and expected utility.

## A. Situs

New presuit information preservation laws are best located within amendments to FRCP 27, the rule on perpetuating witness testimony via deposition. The goals behind presuit information preservation orders mirror the goals behind presuit orders to perpetuate testimony. They both promote assurance that information important for accurate factfinding during later civil litigation will be available.

Unlike presuit witness deposition orders, however, newly-recognized presuit information preservation orders should be able to address both the lack of a duty to preserve and the duty to preserve. Thus, those who have been asked presuit to preserve certain information should be

[1] Professor Emeritus, Northern Illinois University College of Law. B.A., Colby College; J.D., he University of Chicago. The article follows up on Parness and Theodoratos "Expanding Pre-Suit Discovery Production and Preservation Orders," 2019 Michigan State Law Review 652.

able to obtain court orders that preservation is not legally compelled or on how preservation duties can be satisfied.

Without an express rule on presuit information preservation beyond depositions, federal courts might now consider presuit preservation orders founded on their inherent equitable powers.[2] New written norms within Rule 27 will promote the procedural law uniformity generally sought by the FRCP.

### B. Petitioners and Respondents

#### (i) Petitioners

Petitioners eligible for presuit information preservation orders should be limited to potential parties in later federal civil actions. Petitioners should not soley be, however, those who presently cannot bring civil actions.[3] The allowance of presuit information preservation petitions even when civil actions could be filed serve several important purposes. They include allowing petitioners to better meet their presuit "reasonable inquiry" duties under FRCP 11; avoiding litigation over the current ability to sue; promoting more informed presuit settlements; and, most

[2] See FRCP 27(c) (the rule on presuit depositions "does not limit a court's power to entertain an action to perpetuate testimony").

[3] In his FRCP 37(e) proposal, Professor Spencer urged that a petition for presuit discovery should only be pursued by one expecting to be a party in a civil action "cognizable in a United States court" who "cannot presently bring it or cause it to be brought." A. Benjamin Spencer, "The Preservation Obligation: Regulating and Sanctioning Pre-Litigation Spoliation in Federal Court," 79 Fordham L. Rev. 2005, 2023 (2011) [hereinafter Spencer] (proposed FRCP 37(e)(3)(A)(i)). Yet petitioners should sometimes be able to proceed even where any future claim may now be brought. Presuit settlements founded on accurate factual assessments would be encouraged. Both federal and state civil procedure laws on presuit information preservations via depositions to perpetuate testimony have no requirements on the current inability to bring a civil action or cause a civil action to be brought. See, e.g., FRCP 27(a)(1) and Montana Civil Procedure Rule 27(a)(1).

importantly, promoting compliance with preexisting information preservation duties, which may or may not be tied to foreseeable litigation.[4]

#### (ii) Respondents

A broad range of people and entities should be subject to presuit information preservation orders. Thus, orders should be able to reach beyond an expected adverse party. Yet any potential party, when known, should usually be notified of any presuit preservation petition. Presuit discovery often is not more burdensome on respondents than postsuit discovery wherein parties and nonparties alike can be summoned through depositions. Of course, presuit discovery is necessarily more speculative as there is no guarantee of a later civil action. Thus, respondents should be less available for presuit discovery than for postsuit discovery, as with Rule 27 depositions.

### C. Petition Contents

Petitions seeking presuit information preservation orders, given their pleas for extraordinary relief, generally should be quite detailed, as well as certified and verified. Lawyers should certify reasonable inquiry, which might include earlier meet and confers and proportionality assessments. Their clients should at times need to verify the factual circumstances prompting their requests for presuit judicial assistance, perhaps as well as allegations of a statutory, common law, procedural rule, or contractual duty to preserve. Petition

[4] Duties tied to foreseeable litigation arise, for example, under FRCP 37(e) on irreplaceable electronically stored information (esi). Duties untethered to foreseeable litigation arise, for example, under statutes on medical record maintenance.

requirements thus should track somewhat the dictates on lawyers and parties who file complaints[5] or who seek provisional remedies.[6]

A petition for a presuit information preservation order should contain the possible subject matter of a later action; the facts a petitioner wishes to learn through the preserved information when it is revealed; and the expected adverse party or parties, if then known. A petition for a presuit information nonpreservation order should, at the least, contain the problems arising from the legal uncertainties and potential costs arising when presuit demands for information preservation have been made.

Presuit preservation orders should sometimes be permitted even where the information can otherwise be obtained. Reasonable inquiry dictates, however, should compel potential presuit petitioners to engage first in efficient information gathering and storage outside of discovery. Yet very burdensome information gathering should not be expected when it can be fairly avoided through judicial action.

### D. Proportionality

As with many postsuit discovery requests, a presuit information preservation request should only be made after the petitioner's assessment of proportionality. For postsuit discovery in a federal district court, one seeking discovery must certify that the request is "neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the

[5] See, e.g., FRCP 11(b)(2) (lawyers must certify that "legal contentions are warranted by existing law" or by a nonfrivolous argument for a change in the law) and FRCP 11(c)(1) (parties "responsible for" Rule 11 violations, typically involving "factual contentions" without "evidentiary support," per FRCP 11(b)(3) and (4), may be sanctioned).

[6] See, e.g., FRCP 65 (requests for temporary restraining orders must be supported by "specific facts in an affidavit or a verified complaint clearly" showing the need for immediate relief).

action."[7] In ruling, a district judge must consider whether the request is "proportional to the needs of the case, considering the importance of the issues at stake…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 benefits."[8]

Clearly, proportionality assessments will differ for the same requested information in presuit and postsuit settings. Given the more speculative nature of the need for the information, proportionality relating to presuit requests should be more difficult to demonstrate. Yet, an irreparable harm standard is unwarranted, especially where petitioners rely on the clear preexisting duties of the respondeats to preserve and claim that court orders are needed in order to insure compliance which otherwise will likely (or may) not occur.

### E. Meet and Confer

Presuit information preservation petitions should normally be preceded by "meet and confer" encounters between potential petitioners, respondents, and other possible parties in future litigation.[9] Reasonable efforts should be made to agree on information preservation (and

[7] FRCP 26(g)(1)(B)(iii).

[8] FRCP 26(b)(1).

[9] Professor Hoffman found in Texas that a lack of an express notice requirement covering future litigants led to instances of no notice given, prompting changes to the Texas presuit discovery rule. Lonny Sheinkopf Hoffman, "Access to Information, Access to Justice: The Role of Presuit Investigatory Discovery," 40 Univ. Mich. J.L. Reform 217, 270-272 (2007).

sometimes access). Similar compelled encounters are commonplace under the FRCP before discovery begins[10] and when postsuit discovery disputes arise.[11]

### F. Available Forms of Relief Beyond Preservation

Presuit information preservation orders should, at times, be available to prompt information disclosures to petitioners together with information preservations by respondents. So, at times, copies of documents will be ordered to be revealed to petitioners while the originals will be ordered to be preserved by the respondents.

Presuit information preservation orders may sometimes prompt preservation for a time, followed by disclosures necessitating information destruction. For example, a machine involved in an accident might be ordered to be preserved and then tested even if the testing will result in complete destruction, or permanent alteration, of the machine. Such a presuit testing order is particularly appropriate when the machine is key evidence in a likely future lawsuit and will naturally spoil over time.

As noted, available forms of relief should also include protective orders on behalf of petitioners. Thus, at least some who receive presuit information preservation demand letters should have standing to seek declaratory relief on whether or not there is a preservation duty, as well as on the parameters of any such duty. Standing to seek a presuit declaration is easily

[10] See, e.g., FRCP 26(f) (good faith effort to formulate discovery plan) and FRCP 26(d)(1) (no discovery until conferral required by FRCP 26(f) regarding a discovery plan).

[11] See, e.g., FRCP 26(c)(1) (good faith effort to resolve discovery dispute before a motion for a protective order may be filed). Local court rules sometimes extend such dispute resolution obligations following private meet and confers which do not resolve discovery disputes. See, e.g., U.S. Dist. Ct., S.D. of Indiana, Local Rule 37-1(a) (before district judge involvement in a "formal discovery motion," counsel must confer with "assigned Magistrate Judge" in order to see if dispute resolution is possible).

justified, for example, where the relevant information is quite costly to maintain; where the facts in any later lawsuit will likely be generally undisputed; and, where an explicit statute or an express contract calls for the petitioner to have no preservation obligation.

### G. Cost Shifting and Sanctions

The costs of compliance with presuit information preservation orders directing that certain information be preserved by the respondent should be able to be shifted from the respondent to the petitioner, not unlike compliance costs for certain postsuit discovery orders.[12]

Sanctions for discovery violations should be available and track the sanctions available for similar (or somewhat similar) postsuit discovery violations.[13] Of course, there will be no perfect overlap. For example, sanctions involving future jury instructions might generally be out of place in presuit discovery settings. Some individual or entity liability for sanctions due to failures by agents should also be expressly recognized in the Comment to the new FRCP 27.[14]

### H. Choice of Law

Vexing choice of law issues can arise with presuit orders on information preservation. For some presuit preservation requests, the information might be found in one state while the

[12] See, e.g., FRCP 26(b)(4)(E) (party seeking discovery involving an adversary's expert must pay some fees and expenses).

[13] See, e.g., Illinois Supreme Court Rule 224(b) (sanctions available for postsuit discovery violations "may be utilized by a party initiating" an independent action for presuit discovery or by a respondent in such an action).

[14] Liability for principals due to any agent actions is sometimes unwarranted. Compare FRCP 11 (on law firm liability for only some pleading failures by their attorneys). Thus, entity liability should normally arise when an agent's failure was caused, wholly or in significant part, by the entity's deficient system on litigation holds. But no entity liability should be grounded on an agent's purposeful destruction of information solely geared to shielding the agent from personal liability, where the entity directed there should be no such destruction.

holder of the information and the potential civil litigants are in other states. Without a preservation order, spoliation torts, as well as spoliation sanctions, perhaps can be pursued in later federal district court cases. But opportunities for FRCP presuit information preservation orders are also needed. And when justified, the court hearing the presuit petition will need to consider at times not only federal procedural common law duties on information preservation, but also varying state laws -- substantive and procedural -- on information preservation.

## I. Appeals

As there are no claims in the traditional sense, appeals of orders on presuit information preservation petitions cannot be grounded on the traditional final judgment rule. Appellate standards should be comparable to the standards for interlocutory reviews of formal discovery orders during civil litigation. Appeals will thus sometimes follow the precedents on friendly contempts by respondents. When petitioners are denied, appeals should sometimes be available, as when the dispute is ripe and cannot await any future lawsuit because the information, in the interim, will likely be lost.

## J. Later Effects

Because presuit discovery is more speculative than postsuit discovery, denials of presuit information preservation petitions should not always foreclose similar discovery requests postsuit. Further, grants of presuit petitions should not foreclose follow-up, related postsuit discovery requests since new information may have been created or old information may have become unreliable. Further, presuit orders that require continuing preservation should be amenable to modification, including in later related civil actions.

## Conclusion

A new FRCP 27 should, at the least, authorize certain presuit court orders involving information preservation when the information, relevant to possible later litigation, will likely spoil otherwise and/or is already subject to a preservation duty, as under FRCP 37(e) on esi. The new rule should authorize both presuit information preservation orders and presuit protective orders declaring a lack of any preservation duty, especially where a presuit information preservation demand has been made, is disputed, and warrants immediate judicial attention. The availability of more expansive presuit information preservation orders will promote greater uniformity among district courts and enhance accuracy in later civil litigation factfinding. The new rule (additions underlined) should read: "This rule does not limit a court's power to entertain an action to perpetuate testimony and an action involving presuit information preservation when necessary to secure the just, speedy, and inexpensive resolution of a possible later federal civil action."

.