

Trial Briefs

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The amendments to the federal rules: E-discovery is the focus

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On December 1, 2015, the Amended Federal Rules took effect, representing the most sweeping changes to the Rules in years and directly impacting electronic discovery. The amendments will mark a culmination of efforts that have been ongoing for the past five years, or since the last time the rules were amended, to address many of the perceived shortcomings in the current Rules regime—namely promoting efficiency in litigation and curtailing rising discovery costs.

To that end, the new amendments are designed to usher in a new era of proportional discovery, increased cooperation, reduced gamesmanship, and more active judicial case management.

In summary, a few of the changes include the following:

- Modifying Rule 26(b)(1) to spotlight the limitations that proportionality standards impose on the permissible scope of discovery;
- Rule 34 amended allowing for discovery to be served prior to the Rule 26(f) Conference. In addition, the amended rule also calls for parties to be more specific in their objections and responses to Requests for Production;
- Changes to Rule 37(e) to provide a uniform national standard regarding the issuance of severe sanctions addressing spoliation of electronically

stored information (ESI). They will also introduce a new framework for determining whether sanctions of any nature should be imposed for ESI preservation shortcomings.

The Road to Restoring Proportionality: Amendments Aim to make Proportionality Relevant for first time in 33 years

Rule 26(b) defines the scope and limits of discovery as well as the concept of proportionality in the discovery process. Generally, “proportionality” attempts to ensure that the scope of discovery is reasonable in light of the needs of the case and the resources of the parties.¹

Currently, the scope of permissible discovery pursuant to Rule 26(b)(1) broadly includes “any nonprivileged matter that is relevant to any party’s claim or defense – including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter.”² The rule also notes that “relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.”³ While it is not explicitly referenced within the defined “scope of discovery,”

proportionality considerations do appear within the discovery limitations enumerated under Rule 26(b)(2)(C): “[o]n motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that . . . (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.”⁴

The Rule has long been chastised for permitting “overdiscovery” or fishing expeditions, as some critics have taken the liberty of relabeling the issue. As a result, it has become all too easy for parties to run up a big bill chasing down and producing ESI that has little, if any, real value or impact upon the merits of the case. To that end, critics have warned that there is little recourse to guard against circumstances where high volume discovery is used as a weapon to induce settlement. While proportionality requirements are nothing new to Federal Rule 26, the amended rule seeks to keep pace with rising costs and effectively narrow the scope of discovery by making proportionality the focal point. Moreover, to bolster that effort and further clarify the scope, the Committee

has removed the “reasonably calculated” language from the text to address the general misconception within the legal community that the rules allow for broad and sometimes seemingly limitless discovery.

Proportionality not a new concept, restoration tried and tested

Since their enactment in 1938, the Federal Rules have been amended several times to keep pace with the changing demands of courts and parties. The origins of proportionality date back to the pre-digital age of 1983 when the problem of “over-discovery” was identified.⁵ In 1983, Rule 26(b)(1) was amended to grant courts the authority to limit discovery where it was found to be redundant or duplicative.⁶ As noted in the 1983 Committee Notes, when Rule 26(b)(2)(C)(iii) was first adopted, the intent for “proportionality” was to “deal with the problem of over-discovery . . . and guard against redundant and disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry.”⁷

Various efforts have been made to limit the scope of discovery since 1983. In 1993, the Committee moved the proportionality factors from Rule 26 (b)(1) to 26 (b) (2)(c) and added two new factors: “the importance of the proposed discovery in resolving the issue” and whether “the burden or expense of the proposed discovery outweighs its likely benefit.”⁸ The intention behind the new rule was that it would add further judicial flexibility to address the tremendous increase in the amount of potentially discoverable information caused by the “information explosion of recent decades” and the corresponding increase in discovery costs.⁹ The Advisory Committee Notes explain that “the revisions in Rule 26 (b) (2) were intended to provide the court with broader discretion to impose additional restrictions on the scope and extent of discovery.”¹⁰ However, in turn, they also may have softened the clear focus of the 1983 amendments.¹¹ Again in 2000, Rule 26(b)(1) was amended to incorporate proportionality factors by reference to

their location in the subtext to the rule as limitations on discovery.¹² Further, new language was added stating that discovery was now limited to matters “relevant to a party’s claim or defense” replacing “relevant to the subject matter,” which was much broader.¹³ The most recent effort to address discovery burdens and costs came in 2006 when Rule 26(b)(2) was amended to limit the discovery of ESI deemed not reasonably accessible by reason of the costs and burdens associated with retrieving such information.¹⁴

In 2010, the Sedona Conference, recognized that “notwithstanding the . . . amendments, courts have not always applied proportionality in circumstances when its application was warranted.”¹⁵ Further, the Sedona Conference emphasized that “in the electronic era, it has become increasingly important for courts *and* parties to apply the proportionality doctrine to manage the larger volume of ESI and associated expenses now typical in litigation.¹⁶ At the 2010 Duke Conference, a conference organized by the Committee with the purpose of seeking “better means to achieve Rule 1’s goal of just, speedy, and inexpensive determination of every action,”¹⁷ concerns about proportionality in discovery once again resurfaced.¹⁸ Survey results of attorneys (most of whom are corporate counsel) and judges shared at the 2010 Conference led the Advisory Committee to conclude that additional proportionality in discovery was needed and that returning the proportionality factors to Rule 26(b)(1) and making other amendments to Rule 26(b)(1) would improve discovery.¹⁹

Breaking Down Amended Rule 26

Submitting to the exhortations of big corporate interests, the Committee made several amendments to Rule 26, which include a narrowing of the scope of permissible discovery and moving the proportionality standard currently found under Rule 26(b)(2)(c)(iii) to a more prominent position under Rule 26(b)(1). Amended Rule 26 (b)(1) reads as follows:

Unless otherwise limited by court order, the scope of discovery is as follows: Parties

may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the 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 in evidence to be discoverable.²⁰

Proportionality Front, Center, and out of the Protective Order Purview

Previously buried in the subtext to the rule, proportionality will soon be restored to the forefront of the discovery discussion as was the intention when it was implemented 33 years ago. Under the present rule, the proportionality factors function as a court-ordered limitation on discovery and are usually only implicated by motions for a protective order. The amendment moves the proportionality requirement previously included under Rule 26(b)(c)(iii) to Rule 26(b)(1) and within the defined “scope of discovery.”²¹ The Committee Notes accompanying revisions to Rule 26 state that the change “restores the proportionality factors to their original place in defining the scope of discovery.”²²

While it may not seem like a significant change, placement here is key. The process of requiring the responding party to seek a protective order, wherein they must prove potential harm and need for protection under Rule 26 (b)(2)(C), can be expensive and is riddled with uncertainty. Trial judges exercise broad discretion in this arena and protective orders are not lightly provided. Moreover, as a practical matter, judges have already begun to take notice of the new placement and have echoed the Committees’ sentiments on this point. Recently, Judge John Ott (N.D. Ala.) joined e-discovery expert attorneys and other District Court Judges to discuss the rule changes and commented: “The

amendment does three (3) things: (1) it makes it more visible; (2) it emphasizes it; and (3) it prioritizes it. In other words, to us as judges, I interpret this to mean that this is very important. It is primary and is not second nature any longer. It is no longer about a protective order and it's something that we as judges should be thinking about as well as the parties from the outset. It changes the dynamic dramatically and for the better."²³

New Proportionality Consideration for Protective Orders

In addition to the new placement, proportionality and scope considerations of Rule 26(b)(1) are further bolstered by an addition to Rule 26(c)(1)(B), which authorizes courts to enter protective orders that include "allocation of expenses" arising from discovery.²⁴ The new provision is intended to provide recourse to those parties who face abusive discovery purposely served to drive up the cost of litigation. Further, by connecting the cost of discovery to the party who seeks to benefit from it, parties will be forced to consider more closely whether the requests in question are truly necessary to support their case. However, in the amendment notes, the Committee warns that this change does not imply that cost-shifting should become common practice and that courts and parties should continue to assume that a responding party ordinarily bears the costs of responding.²⁵

The Sixth Factor- Parties' Relative Access to Relevant Information

In addition, a new proportionality factor was added. The amended rule requires the court to consider "the parties' relative access to relevant information."²⁶ According to the Advisory Committee, this factor is intended to explicitly recognize that some cases involve information asymmetry where a party seeking discovery may know very little about the facts as compared with the responding party.²⁷ Such an asymmetry, it is argued, may justify one party bearing greater burdens in discovery than another.²⁸ However, opponents argue that the addition of this factor could adversely affect large corporate defendants in suits filed by smaller entities or individuals on account of

the disparity in reach and resources.²⁹

Proportionality Priority, Money is No Object

Another change to Rule 26, albeit a subtle one, is the order of the proportionality factors. The words "amount in controversy" now follow "importance of the issues at stake."³⁰ The New pecking order tries to capture the idea that even when there may not be an amount in controversy, the lawsuit may still involve crucial issues such as in discrimination cases or those involving the First Amendment. The intention behind the new order is to make clear to courts and litigants alike that we are not just looking at dollars.

Parties Can No Longer Lobby for Discovery Solely upon the basis that it is "reasonably calculated to lead to the discovery of admissible evidence"

Perhaps the most important change to the discovery rules is the removal of the often cited phrase "reasonably calculated to lead to the discovery of admissible evidence" which the Committee noted has created problems in defining the scope of discovery.³¹ The phrase is replaced with new language stating that "information within the scope of discovery need not be admissible in evidence to be discoverable."³² As the Committee Note to the 2000 amendments observed, use of the "reasonably calculated" phrase to define the scope of discovery "might swallow any other limitation to the scope of discovery."³³ Further, the Committee recognized: "lawyers and courts continue to cite the 'reasonably calculated' language as defining the scope of discovery. Some even disregard the reference to admissibility, suggesting that any inquiry 'reasonably calculated' to lead to something helpful in the litigation is fair game in discovery."³⁴ Significantly, while the amendment will eliminate this reading of Rule 26(b), it preserves the rule that valid discovery cannot be opposed solely on the basis that it does not lead to admissible evidence.

Moving Forward- Still a Price to be Paid

While most commenters believe that the amendment will make litigation costs

more proportionate to each case with the renewed emphasis on proportionality, there are still many who have complained that moving the proportionality analysis back to the forefront of the discussion will severely limit the amount discovery and only inure to the benefit of defendants.³⁵ Moreover, and to that point, there is serious concern that the requesting party will have to justify the need for every discovery request presented to the opposing party.³⁶

Specifically, among the issues left unresolved is who bears the burden of showing that the discovery sought is proportional. In comments submitted to the Advisory Committee regarding the new Rule 26(b)(1), Hon. Shira Scheindlin (S.D.N.Y.), widely recognized to be one of the most influential figures on the federal bench on e-discovery issues, observed that the new concept of proportionality "invites producing parties to withhold information based on a unilateral determination that the production of certain requested information is not proportional.... That will mean the requesting party must make a motion, at considerable expense."³⁷ Although the Advisory Committee states that the new Rule 26(b)(1) is not intended to place the burden of proving proportionality on the party seeking discovery,³⁸ it remains to be seen whether the change will precipitate boilerplate refusals to produce information on the ground that it is not proportional. Still, burden of proof aside, some commenters feel that the proportionality standard and its five enumerated factors will result in excessive motion practice as parties litigate the meaning of these terms in the context of their case.³⁹

Ultimately, despite speculation concerning the effects of the new proportionality placement in practice, there is no question that the framework is in place for the amendments to achieve their desired effect - narrowing and restricting the overall scope of permissible discovery. In addition to the renewed emphasis on proportionality, removal of the "reasonably calculated" language as well as the potential for cost-shifting should serve to not only limit the scope but also guard against abusive discovery tactics.

Further, greater judicial involvement and increased cooperation among the parties is a necessary byproduct of the rule change. As conceived, the proportionality requirements will serve as guideposts and provide judges, who may have been reluctant to curtail discovery in the past, with the necessary tools to reign in overly broad discovery requests and speed up the overall litigation process. Finally, the amendments should also encourage parties to openly discuss and weigh proportionality considerations before any discovery is even commenced.

Early Rule 34 Requests Aim to Make 26(f) Conferences More Productive

Rule 34 governs the procedures for propounding and responding to requests for production. Amended Rule 34 now reads:

- (A) *Time to Deliver.* More than 21 days after the summons and complaint are served on a party, a request under Rule 34 may be delivered:
 - (i) to that party by any other party, and
 - (ii) by that party to any plaintiff or to any other party that has been served.
- (B) *When Considered Served.* The request is considered to have been served at the first Rule 26(f) conference.⁴⁰

Under the former Rule 26(d), a party could not serve discovery requests of any sort prior to the parties' Rule 26(f) conference. As a practical matter, it is more than likely that the parties may not convene until months after a complaint is filed. Under the amended rule, requests may be served much earlier, as soon as 22 days after service of the complaint and summons. Further, service can occur even if the parties have not yet had a 26(f) conference. However, the time for responding to those early requests remains the same and only begins counting down at the 26(f) conference. Finally, "party" under the rule

can include third-party defendants or additional counterclaim defendants whom the defendant has promptly served.

According to the Advisory Committee, the purpose of allowing early discovery requests is to make parties' Rule 26(f) conferences more productive.⁴¹ Accordingly, if parties know what requests will be propounded and what documents will have to be searched to respond, they are more likely to focus discussion at the conference on agreements to facilitate document searches and production.⁴² Thus, at least in theory the early requests will help to streamline discovery. Moreover, negotiations at the Rule 26(f) conference, when conducted with knowledge of each side's initial requests, may cause the parties to revise broad requests in favor of more narrow (thus reasonable) ones, preventing unnecessary motion practice.⁴³

Moving Forward- How Soon is Too Soon?

Views on this amendment to Rule 26(d)(2) have been mixed. Some commentators doubt parties will seize this new opportunity to serve earlier discovery requests, for example because doing so may allow more time for responding parties to formulate objections and arguments against production (since the responding party still has at least 30 days from the Rule 26(f) conference to respond).⁴⁴ Others are concerned that requests served early will be unhelpful—in particular because they are not prepared in light of agreements reached at the Rule 26(f) conference.

Judge Sidney I. Schenkier submitted comments on behalf of the Federal Magistrate Judges Association ("FMJA"), whose stated purpose is to promote the efficient administration of justice. Schenkier warns that "allowing a party to serve discovery requests before the other party has answered the complaint is at odds with the new emphasis on proportionality . . . because the issues in a case are not yet framed until the parties have . . . admitted or denied the allegations."⁴⁵ Thus, permitting early document requests "without having to consider what is actually at issue invites the parties to serve the broadest possible requests."⁴⁶ Schenkier fears that early discovery requests "will

devolve into a routine practice of serving boilerplate, shotgun requests as a means of seeking an adversarial advantage." Ultimately, early service "will lead to more disputes at the Rule 26(f) conference, thereby impeding the progress of the case."⁴⁷

Responses to Rule 34 Requests-Specificity is Key

Amendments to Rule 34 address objections to document requests and were designed to eliminate what the Committee considered to be "three relatively frequent problems in the production of documents and ESI," which are listed as follows:

- (1) the use of broad, boilerplate objections that provide little information about the true reason a party is objecting;
- (2) responses that state various objections, produce some information, and do not indicate whether anything else has been withheld from discovery on the basis of the objections; and
- (3) responses which state that responsive documents will be produced in due course, without providing any indication of when production will occur and which often are followed by long delays in production.⁴⁸

Specific Objections. The main change to Rule 34 reflects a change to the amount and type of information a party must include in any objection to a request for production to address concerns about general objections that leave the requesting party unsure of whether, and what, materials the producing party withheld. Specifically, Rule 34(b)(2)(B) requires that a party object to a Rule 34 request "with specificity."⁴⁹ Objections that a request is "vague and ambiguous" or "unduly burdensome" without more may be prohibited.⁵⁰

Specific Deadline for Production. Next, Rule 34(b)(2)(B) addresses the actual production of documents and permits a responding party to "state that it will produce copies of documents or ESI instead of permitting inspection, and should specify a reasonable time for production."⁵¹ As far as the language itself is concerned, the term "inspection" has been eliminated as it does not have any application to ESI and was merely a holdover from the pre-digital era of discovery. Moreover, the

Committee Note specifically references making rolling productions, and it indicates that a party's response should include beginning and end dates for such productions.⁵²

Specificity as to Whether Production is Being Withheld. Finally, Rule 34(b)(2)(C) requires that "an objection state whether any responsive materials are being withheld on the basis of the objection."⁵³ Under the former rule, if a responding party objected to a request but nonetheless produced some documents, the propounding party could argue that it had no way of knowing whether any documents were being withheld based on the objection.⁵⁴ This lack of clarity, it has been argued by some, often gives rise to back-and-forth correspondence that does not alleviate the confusion.⁵⁵ The amended rule helps avoid these arguments by requiring the responding party to disclose whether any of its objections are being relied on to withhold documents. However, on this point the Committee Note clarifies that "the producing party does not need to provide a detailed description or log of all documents withheld, but does need to alert other parties to the fact that documents have been withheld and thereby facilitate an informed discussion of the objection."⁵⁶ Finally, it is sufficient to state the limits of the search for responsive materials.⁵⁷

Moving Forward- More Information, Less Gamesmanship

The level of specificity required to satisfy the Rule is not enumerated in the rule itself or clarified in the comments. As such, this will likely be a source of confusion and contention between parties going forward. Similarly, there is no clarity as to what qualifies as a reasonable time for production. Presumably, a reasonable time will be a very fact specific inquiry that will fluctuate from case to case.

Next, as practitioners are well aware, it is common during discovery for a party to state that documents will be produced in the future without committing to any date certain. Under the amended rule, parties will no longer be afforded this luxury as documents produced in lieu of an inspection must now be produced by a specific date—either by the date

requested in the request or a "reasonable time." However, at the very least the rule change ensures that the responding party will have to provide more information to the requesting party and parties will have a much more difficult time "hiding the ball" from one another. Moreover, the changes will help foster cooperation between parties and could potentially make Rule 26(f) meetings more productive.

Spoilation of Electronically-Stored Information

Amended Rule 37(e) "addresses actions courts may take when ESI that *should have been preserved* is lost"⁵⁸ and applies only to ESI rather than tangible evidence. Often referred to as the Safe Harbor Rule, 37(e) provides refuge from sanctions for spoliation of evidence when electronically stored information has been destroyed pursuant to the routine, good faith operation of an electronic information system.⁵⁹ Peace of mind assurances aside, the rule was also intended to serve as a protection against absurd preservation obligations for "Corporate America" and reduce operating costs associated with data retention.⁶⁰

However, as a practical matter, the Safe Harbor Rule saw little use and provided little safety when potentially responsive ESI was destroyed before or during litigation. For Judge Paul Grimm (D. Md.), the current rule only allows for a "limited safe harbor" as parties are exempt from sanctions in the event of certain systematic loss of ESI, such as the operation of a company autodelete policy.⁶¹ Needless to say, the issue of when a duty to preserve attaches has certainly not gone unnoticed. However, it was an issue that ultimately was not resolved this time around by the Committee. Rather, a unanimous recommendation was made for a comprehensive review of what a court's response should be when ESI is not available and may have contained relevant or necessary information in litigation.

Up against the issue of when the duty to preserve attaches was the fact that the costs of over preservation were becoming a huge concern. According to Judge Grimm, "The question was presented that there was a

significant volume of ESI that was building up because large organizations were trying to come up with a preservation regime that would apply to them and the case law."⁶² Moreover, he explained that "a circuit split began to develop, where the level of culpability required to issue sanctions when ESI was not preserved ran the gamut from negligence to recklessness to outright willfulness."⁶³ To that end, in an effort to eliminate a circuit split and in turn relieve massive and costly over preservation, the Committee fashioned a uniform standard and established a framework that outlines the different actions a court may take where a party has failed to meet its duty to preserve evidence.

Amended Rule 37(e) now reads as follows:

FAILURE TO PRESERVE ELECTRONICALLY STORED INFORMATION. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps No sanctions may issue against a party for spoliation of ESI unless all 4 of the following criteria are satisfied:

- (i) the ESI should have been preserved;
- (ii) it is lost;
- (iii) the party failed to take reasonable steps to preserve it; and
- (iv) it cannot be restored or replaced (through additional discovery).⁶⁴

First, the amended rule is limited to the loss of information that "should have been preserved." Further, the Committee noted that many court decisions hold that the duty to preserve attaches when litigation is reasonably foreseeable.⁶⁵ Moreover, Rule 37(e) is based on the common law duty and the amendment does not attempt to create a new duty to preserve.⁶⁶

Only Reasonable Steps, Not Perfection

Next, the rule only applies if the data

loser “failed to take reasonable steps” to preserve the data. As such, the rule will be “inapplicable when the loss of information occurs despite the party’s reasonable steps to preserve”⁶⁷ as in the case of a flood or other occurrence outside of the preserving party’s control. “Reasonable steps” is not defined in the amended rules. However, the Committee explained that the rule requires only reasonable preservation steps, not perfection.⁶⁸ Further, in order to determine what are reasonable steps the court should be “sensitive” to the “party’s sophistication” with regard to litigation.⁶⁹ Accordingly, a wealthy corporation with a high volume of pending litigation will be expected to do more to meet the reasonableness standard than an individual litigant. Finally, staying true to its new found commitment to proportionality in discovery, the Committee noted that proportionality, including consideration of the party’s resources, is among the factors to be considered in evaluating reasonableness.⁷⁰ The note further explained that aggressive preservation efforts can be extremely costly, and parties (including governmental parties) may have limited staff and resources to devote to those efforts.⁷¹

First Remedy to loss of ESI: More Discovery

When a party fails to take reasonable steps to preserve ESI that should have been preserved and the information is lost as a result, the rule states that additional discovery is the first remedy to be considered. However, there is no consequence if the information can be “restored or replaced through additional discovery” and “no further measures should be taken.”⁷² However, these efforts to replace or restore are not without limits as they should be “proportional to the apparent importance of the lost information.”⁷³ To that end, it is noted that “substantial measures should not be employed to restore or replace information that is *marginally relevant or duplicative.*”⁷⁴

NEXT, if all four of these criteria are satisfied:

- (1) Upon a finding of prejudice to another party

from loss of the information, order measures no greater than necessary to cure the prejudice;⁷⁵

Must be a finding of Prejudice and Measures are Restricted to Cure

According to subsection (e)(1), if additional discovery will not suffice AND the requesting party is prejudiced from the loss, the court “may order measures no greater than necessary to cure the prejudice.” Thus, the rule focuses not only on the importance of remedial measures but also that the court order be narrowly tailored to address the prejudice and not go beyond that. Significantly, “the rule does not place a burden of proving or disproving prejudice on one party or the other.”⁷⁶ Rather, it “leaves judges with the discretion to determine” how best to make that assessment.⁷⁷ There are no specific measures identified under the rule. However, by way of illustration, the Committee noted that in some cases “serious measures” such as forbidding the responsible party from putting on certain evidence or permitting argument before the jury regarding the loss may be appropriate.⁷⁸ Still, the notes caution that “care must be taken to ensure that curative measures under subdivision (e)(1) do not have the effect of the more serious measures permitted under subdivision (e)(2)” per a finding of *intent to deprive* another party of the lost information’s use in the litigation.⁷⁹

- (2) Only upon a finding that the party acted with the *intent to deprive* another party of the information’s use in the litigation,

- (A) presume that the lost information was unfavorable to the party;

- (B) instruct the jury that it may or must presume the information was unfavorable to the party; or

- (C) dismiss the action or enter a default judgment.⁸⁰

Severe Sanctions- Prejudice can be inferred upon a finding of intent

In order to obtain the most severe measures under Rule 37(e)(2), the moving party must additionally demonstrate that the alleged spoliator “acted with the intent to deprive another party of the information’s use in litigation.”⁸¹ “A primary purpose of this provision is to eliminate the circuit split on when a court may give an adverse inference jury instruction for the loss of ESI.”⁸² In particular, the rule rejects those cases that authorized the imposition of an adverse inference instruction upon a finding of negligence or gross negligence. Further, unlike subdivision (e)(1), subdivision (e)(2) *does not* require a finding of prejudice from the loss. The Committee explained that “this is because the finding of intent required by the subdivision can support not only an inference that the lost information was unfavorable to the party that intentionally destroyed it, but also an inference that the opposing party was prejudiced by the loss of information that would have favored its position.”⁸³

The severe sanctions a court could issue under Rule 37(e)(2) are limited to dismissing the case, entering a default judgment, or “instructing the jury that it may or must presume the information was unfavorable to the party.”⁸⁴ Nevertheless, a court is under no obligation to order any of these measures even if the specific intent requirement is satisfied.⁸⁵ Rather, as the Committee cautions in the draft note “the remedy should fit the wrong, and severe measures authorized . . . should not be used when the information lost was relatively unimportant or lesser measures such as those specified in subdivision (e)(1) would be sufficient to redress the loss.”⁸⁶

Moving Forward- 37(e) raises more questions than answers

New Rule too Soft?

Heralded by many as the most controversial of the amendments to be enacted, the new 37(e) is certainly not without its critics as it seems to raise more questions than answers. Uniformity among the circuits has been touted by proponents for the new rule to be an invaluable asset, literally. However, still, the old stalwarts

of the soon to be abolished Second Circuit Rule hold firm in their belief that the new rule does not go far enough to curb behavior and protect against loss of information that *does not* meet the specific intent threshold for spoliation.

Judge Shira Scheindlin has been an outspoken champion of the Second Circuit standard. She expressly disagreed with the policy behind the rule and stated:

“Imposing sanctions only where evidence is destroyed willfully or in bad faith creates perverse incentives and encourages sloppy behavior. Under the amended rule, parties who destroy evidence cannot be sanctioned (although they can be subject to “remedial curative measures”) even if they were negligent, grossly negligent, or reckless in doing so.”⁸⁷

As stated previously, the new Rule distinguishes between curative measures and sanctions. Accordingly, under Rule 37(e)(1), a court may “upon finding prejudice to another party from loss of the information, order measures no greater than necessary to cure the prejudice.”⁸⁸ While the Rule expressly excludes the more serious measures in the absence of bad faith, some of the recommended curative measures laid out in the Committee Notes could have enough bite on their own to maintain a real incentive for robust preservation.⁸⁹ For example, the Note explicitly contemplates “serious” curative measures “such as forbidding the party that failed to preserve information from putting on certain evidence, permitting the parties to present evidence, and argument to the jury regarding the loss of information, or giving the jury instructions to assist in its evaluation of such evidence.”⁹⁰ Depending on the particular circumstances, the exclusion of evidence can have a substantial impact on the ability of a party to make its case. Further, while the Rule clearly prohibits a judge from giving an adverse inference instruction in the absence of bad faith, the line between the kind of jury instructions contemplated by Rule 37(e) (1) and a permissive adverse inference may not be entirely clear in all cases.⁹¹

Curative Measures Can be Costly

Next, in addition to the debate concerning whether the new rule provides adequate incentive for preservation, there is doubt as to the supposed efficacy behind the new rule- cutting down costs. Even before there is consideration of curative measures under Rule 37(e)(1), the Rule contemplates exceptional measures “to restore or replace lost information through additional discovery.”⁹² To that end, the Committee Note acknowledges that “discovery from sources that would ordinarily be considered inaccessible . . . may be pertinent to solving such problems.”⁹³ This would appear to be a reference to restoration of backup tapes and other comparable measures for restoring information no longer available in more accessible formats.⁹⁴ There is no question that these measures can be extremely expensive and burdensome. Therefore, even in the absence of a showing of bad faith, the new Rule allows for far reaching measures when a party has failed to preserve ESI.⁹⁵ It will be interesting to see how companies respond here and whether the Rule will succeed in curbing the massive expenses associated with over-preservation.

Courts left to Determine Reasonable Steps and Intent to Deprive

Finally, a likely source of contention between litigants under amended Rule 37(e) will be deciphering the meaning of “reasonable steps” and what constitutes “intent to deprive.” As mentioned prior, a defending party’s failure to show that it took “reasonable steps” to preserve lost ESI is an explicit prerequisite to imposing sanctions. The Committee provides only general guidance on this point and by way of illustration offers scenarios where the destroyed ESI is outside the preserving party’s control such as a flood, fire, etc.⁹⁶ Further, the only other hint that is given to aid in this determination for acceptable preservation efforts is the commentary that states that proportionality should be considered- the parties’ resources and sophistication with regard to litigation.⁹⁷

Further, still, there is even less guidance for the type of behavior that constitutes an “intent to deprive.” The Committee Notes only make clear that the specific intent requirement does not include negligent

or grossly negligent conduct,⁹⁸ much to the dismay of Judge Scheindlin. Further, the note explains that the requirement is akin to bad faith.⁹⁹ However, conduct that is intentional and which results in the spoliation of ESI is not necessarily tantamount to bad faith.¹⁰⁰ To be clear, the Seventh Circuit confirmed years ago that intentional conduct is the lesser standard.¹⁰¹ Addressing a document spoliation question, the Seventh Circuit noted the distinction between bad faith and intentional conduct: “that the documents were destroyed intentionally no one can doubt, but ‘bad faith’ means destruction for the purpose of hiding adverse information.”¹⁰²

To that end, there is a line to be drawn. In the absence of meaningful direction on these issues, it will be left to the trial court to determine how fine that line is as it weighs fact-sensitive differences, once again risking inconsistent rulings across the country. ■

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1. The Sedona Conference, The Sedona Conference Commentary on Proportionality in Electronic Discovery, 11 Sedona Conf. J. 289, 294 (2010) (the rule “limit[s] discovery . . . to ensure that the scope” is “reasonably proportional to the value of the requested information, the needs of the case, and the parties resources”).

2. Fed. R. Civ. P. 26(b)(1).

3. *Id.*

4. Fed. R. Civ. P. 26(b)(2)(C)(iii).

5. Advisory Committee Notes to 1983 Amendments to Fed. R. Civ. P. 26.

6. *Id.*

7. Advisory Committee Notes to 1983 Amendments to Fed. R. Civ. P. 26(b).

8. Advisory Committee Notes to 1993 Amendments to Fed. R. Civ. P. 26(b).

9. *Id.*

10. *Id.*

11. Advisory Committee Notes to 2015 Amendments to Fed. R. Civ. P. 26(b).

12. Advisory Committee Notes to 2000 Amendments to Fed. R. Civ. P. 26.

13. *Id.*

14. Fed. R. Civ. P. 26(b)(2)(B).

15. The Sedona Conference, “The Sedona

Conference Commentary on Proportionality in Electronic Discovery,” 11 Sedona Conf. J. 289, 293 (2010).

16. *Id.*
17. See Judge David G. Campbell, Memorandum re: Proposed Amendments to the Federal Rules of Civil Procedure, Appendix B, B-2 (June 14, 2014).
18. *Id.* at B-8.
19. *Id.* at B-6 to B-7
20. See Fed R. Civ. P. 26(b)(1).
21. Advisory Committee Notes to 2015 Amendments to Fed R. Civ. P. 26.
22. *Id.*
23. *Judicial Perspectives on the Proposed FRCP E-Discovery Amendments* (Exterro, June 14, 2014) (Webcast).
24. See Fed. R. Civ. P. 26(c)(1)(B).
25. Advisory Committee Notes to 2015 Amendments to Fed R. Civ. P. 26.
26. Fed R. Civ. P. 26(b)(1).
27. Advisory Committee Notes to 2015 Amendments to Fed R. Civ. P. 26.
28. Morad, Leeron, *Digging through the New Federal Rules of Civil Procedure*, <http://www.law360.com/articles/654798/digging-through-the-new-federal-rules-of-civil-procedure> (May 26, 2015).
29. *Id.*
30. Compare Fed R. Civ. P. 26(b)(2)(C) with Fed R. Civ. P. 26 (b)(1) (Committee Note 2015).
31. Advisory Committee Notes to 2015 Amendments to Fed R. Civ. P. 26.
32. Fed R. Civ. P. 26(b)(1).
33. Advisory Committee Notes to 2000 Amendments to Fed R. Civ. P. 26.
34. *Id.*
35. See Campbell *supra* note 18, at B-5.
36. *Id.*
37. *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, No. USCRULES-CV-2013-0002-0398, Cmt. by Judge Shira A. Scheindlin, at 2–3 (Jan. 14, 2014).
38. Advisory Committee Notes to 2015 Amendments to Fed R. Civ. P. 26.
39. See *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, No. USCRULES-CV-2013-0002, Cmt. of Bay Area Employment Law Office, at 3 (Feb. 28, 2013).
40. See Fed R. Civ. P. 34.
41. Advisory Committee Notes to 2015 Amendments to Fed R. Civ. P. 26
42. Morad, *supra* note 29.
43. *Id.*
44. *Id.*
45. Amii N. Castle, *Journal of the Missouri Bar Home Page, Avoid Being the Early Worm: Early Service of Rule 34 Document Requests Under the Proposed Amended Federal Rules of Civil Procedure*, <http://www.mobar.org/journal/>

- julaug2015/rule-34.htm (July-August 2015); See also *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, No. USCRULES-CV-2013-0002-0615, Cmt. By Sidney I. Schenkier, at 6 (Feb. 7, 2014).
46. *Id.* at 6-7.
47. *Id.*
48. Advisory Committee Notes to 2015 Amendments to Fed R. Civ. P. 34.
49. Fed R. Civ. P. 34.
50. *Id.*
51. *Id.*
52. See Advisory Committee Notes to 2015 Amendments to Fed R. Civ. P. 34.
53. Fed R. Civ. P. 34 (b)(2)(C).
54. Morad, *supra* note 29.
55. *Id.*
56. See Advisory Committee Notes to 2015 Amendments to Fed R. Civ. P. 34.
57. *Id.*
58. Advisory Committee Notes to 1983 Amendments to Fed. R. Civ. P. 37(e).
59. Philip J. Favro, *Sea Change or Status Quo: Has the Rule 37(e) Safe Harbor Advanced Best Practices for Records Management?* 11 MINN. J.L. SCI. & TECH. 317, 319 (2010); See also KCH Serv., *Inc. v. Vanaire, Inc.*, No. 05-777C, 2009 WL 2216601, at *1 (W.D. Ky. Jul. 22, 2009).
60. Favro, 11 MINN. J.L. SCI. & TECH. at 317, 320.; See COMM. ON RULES OF PRACTICE & PROCEDURE, JUDICIAL CONFERENCE OF THE U.S., PUBLIC HEARING ON PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE, 93–94, 147–48, 365–72 (Feb. 11, 2005) available at <http://www.uscourts.gov/rules/e-discovery/CVHearingFeb2005.pdf>; Thomas Y. Allman, *The Case for a Preservation Safe Harbor in Requests for E-Discovery*, 70 DEF. COUNS. J. 417 (2003).
61. Tera E. Brostoff, *Bloomberg BNA*, <http://www.bna.com/advisory-committee-makes-n17179889550> (April 14 2014).
62. *Id.*
63. *Id.*
64. Fed. R. Civ. P. 37(e) (emphasis added).
65. Advisory Committee Notes to 2015 Amendments to Fed. R. Civ. 37(e) Many court decisions hold that potential litigants have a duty to preserve relevant information when litigation is reasonably foreseeable.
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. Fed. R. Civ. P. 37(e).
76. Advisory Committee Notes to 2015

- Amendments to Fed. R. Civ. 37(e).
77. *Id.*
78. *Id.*
79. *Id.*
80. Fed. R. Civ. P. 37(e).
81. Fed R. Civ. P. 37(e).
82. Advisory Committee Notes to 2015 Amendments to Fed. R. Civ. 37(e).
83. *Id.*
84. Fed. R. Civ. P. 37 (e).
85. Advisory Committee Notes to 2015 Amendments to Fed. R. Civ. 37(e).
86. *Id.*
87. Matthew Nelson, *Veritas ediscovery blog, Judge Scheindlin Blasts Proposed FRCP Amendments in Unconventional Style*, <http://www.veritas.com/community/blogs/judge-scheindlin-blasts-proposed-frcp-amendments-unconventional-style> (August 29, 2013). See also *Sekisui Am. Corp. v. Hart*, 2013 U.S. Dist. LEXIS 115533, 16, 2013 WL 4116322 (S.D.N.Y. Aug. 15, 2013), footnote 51.
88. Fed R. Civ. P. 37(e).
89. H. Christopher Boehning and Daniel J. Toal, *New Rule 37(e) Overrules Second Circuit on Sanctions for Loss of ESI* 251 N.Y.L.J. 105, <http://www.newyorklawjournal.com/id=1202657610674/New-Rule-37e-Overrules-Second-Circuit-on-Sanctions-for-Loss-of-ESI> (June 3, 2004).
90. Advisory Committee Notes to 2015 Amendments to Fed. R. Civ. 37(e).
91. Boehning and Toal, *supra* note 90.
92. Fed R. Civ. P. 37(e).
93. Advisory Committee Notes to 2015 Amendments to Fed. R. Civ. 37(e).
94. Boehning and Toal, *supra* note 90.
95. *Id.*
96. Advisory Committee Notes to 2015 Amendments to Fed. R. Civ. P. 37(e).
97. *Id.*
98. *Id.*
99. *Id.*
100. Philip J. Favro, *The New ESI Sanctions Framework under the Proposed Rule 37(e) Amendments*, 21 Rich. J.L. & Tech. 8 (2015); see also *Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 1327 (Fed. Cir. 2011) (“In determining that a spoliator acted in bad faith, a district court must do more than state the conclusion of spoliation and note that the document destruction was intentional”).
101. Favro, 21 Rich, J.L. & Tech. 8; see also *Mathis v. John Morden Buick, Inc.*, 136 F.3d 1153, 1155 (7th Cir. 1998) (explaining the differences between bad faith and intentional conduct in connection with a defendant’s destruction of relevant information).
102. *Id.*

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