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Course Correction: The Proposed Amendments to the Federal Rules of Civil Procedure on Discovery

By [Nash E. Long](#) and [Anne Kershaw](#)

The Federal Rules of Civil Procedure (“the Rules”) are undergoing revisions that, once finalized, could result in the most significant changes to discovery since the 1993 amendments requiring initial disclosures. On August 15, 2013, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States published for public comment a draft of proposed amendments to the Rules. The main thrust of these amendments is to pull back on the limits of discovery authorized by the Rules, to encourage cooperation among counsel in conducting discovery, and to standardize and lessen the risk of sanctions for spoliation. Over the six month public comment period, more than 2300 comments were received. Those submitting comments to the proposed amendments included legal academics, solo practitioners and small law firms, large national law firms, federal and state courts, corporate counsels, public interest groups, federal agencies, and national, state and municipal professional legal associations. After the public comment period closed, the Judicial Conference Advisory Committee on the Civil Rules (“the Advisory Committee”) voted on the proposed changes on April 10-11, 2014. [Read more](#)

Cloud Computing: Solutions to E-Discovery Concerns

By [Maureen Japha](#) and [Edward Rippey](#)

Cloud computing is more than just a buzz term in information technology. It is a legitimate data storage option that can provide real cost savings to companies both large and small. That said, with new technologies come new challenges — and, as we hear from many institutional clients, cloud computing presents unique challenges in the context of e-discovery. This article provides solutions and thoughts relating to some of these concerns. **What is Cloud Computing?** The National Institute of Standards and Technology (“NIST”) defines cloud computing as “a model for enabling convenient, on-demand network access to a shared pool of configurable computing resources (e.g., networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction. In other words, cloud computing utilizes storage and resources available on the internet, rather than through localized servers owned by an individual company. [Read more](#)

The New ESI Sanctions Framework under the Proposed Rule 37(e) Amendments

By [Philip Favro](#)

The debate over the necessity, substance, and form of the proposed eDiscovery amendments to the Federal Rules of Civil Procedure (Rules) has been ongoing now for over four years. Since the Duke Conference convened in May 2010, the Judicial Conference Advisory Committee on the Civil Rules (Committee) has been working to address many of the perceived shortcomings in the current Rules regime. Their efforts have not been conducted in a vacuum. Interest groups representing parties on either side of the “v” in litigation, the U.S. Department of Justice, and even individual federal judges have lobbied the Committee in an effort to shape the final form of the proposed amendments. This process, while both lengthy and necessary, may finally be reaching its closing stages. With the Standing Committee on Rules of Practice and Procedure having approved the Rules amendment package this past month, the proposed changes appear to be on track for implementation by December 1, 2015. [Read more](#)

Course Correction: The Proposed Amendments to the Federal Rules of Civil Procedure on Discovery

By Nash E. Long and Anne Kershaw



The Federal Rules of Civil Procedure (“the Rules”) are undergoing revisions that, once finalized, could result in the most significant changes to discovery since the 1993 amendments requiring initial disclosures. On August 15, 2013, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States published for public comment a draft of proposed amendments to the Rules.¹ The main thrust of these amendments is to pull back on the limits of discovery authorized by the Rules, to

encourage cooperation among counsel in conducting discovery, and to standardize and lessen the risk of sanctions for spoliation. Over the six month public comment period, more than 2300 comments were received. Those submitting comments to the proposed amendments included legal academics, solo practitioners and small law firms, large national law firms, federal and state courts, corporate counsels, public interest groups, federal agencies, and national, state and municipal professional legal associations. After the public comment period closed, the Judicial Conference Advisory Committee on the Civil Rules (“the Advisory Committee”) voted on the proposed changes on April 10-11, 2014 in Portland, Oregon.

While the proposed amendments were further revised after the close of the public comment period, and again at the Advisory committee meeting in Portland, the substance of the key provisions of the amendments—those dealing with proportionality, sanctions and cooperation—remain largely intact. Much like the study of regulatory history in the field of administrative law, the full meaning of the amended rules requires consideration of the record leading to the final product. This article therefore summarizes the changes proposed, the comments filed, and the current state of the amendment process.²

¹ The public comment period closed on February 15, 2014. The Judicial Conference Advisory Committee on the Civil Rules (“the Advisory Committee”) voted on the proposed changes on April 10, 2014, making further changes to the proposed amendments. The current proposed amendments would become effective on December 1, 2015, if approved by the Advisory Committee, the Committee on Rules of Practice and Procedure, the Judicial Conference, and the Supreme Court, and if Congress does not act to defer, modify or reject them.

² To get a balanced sense of commentator sentiment, comments from notable members of each constituency group above were analyzed for this article, specifically the following: [Lawyers for Civil Justice](#), [Institute for the Advancement of the American Legal System](#) (“IAALS”), the [American College of Trial Lawyers](#) (“ACTL”), [National Employment Lawyers Association](#) (“NELA”), [American Association for Justice Employment Rights Section](#) (“AAJ Employment Rights Section”), [New York County Lawyers Association](#) (“NYCLA”), [US Equal Employment Opportunity Commission](#) (“EEOC”), joint submission of 110 legal academics, [US House Judiciary Committee Democrats](#), [Federal Magistrate Judges Association](#), [Congressional Black](#)

I. Rule 26(b)(1) and the Scope of Discovery

A. The Proportionality Proposal.

Perhaps the most significant change that would be wrought by the proposed amendments concerns Rule 26(b)(1). This proposed amendment would require “proportional discovery” and restrict it to information relevant to the claims and defenses asserted by the parties. “Proportionality” requires aligning the obligation to produce discovery to the cost of production, the significance of the claims in dispute, and the needs of the case. Currently, Rule 26(b)(1) authorizes discovery that can be quite broad and far-ranging.

Parties may obtain discovery regarding 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 identify and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action.

F.R.C.P. 26(b)(1). The proposed amendment would limit this broad scope by requiring that discovery be “proportional to the needs of the case” as measured by a cost-benefit calculus similar to that currently required by Rule 26(b)(2)(C)(iii).

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.

Proposed Rule 26(b)(1) (emphasis added).³ Furthermore, courts would no longer have the option of allowing discovery relevant to the “subject matter of the action.” Rather, the proposal eliminates that option for the court and limits discovery on the basis of both relevance (to the claims and defenses) and proportionality.⁴

These discovery restrictions stem from the Advisory Committee’s Discovery Subcommittee’s finding that the current rule’s language has been interpreted too broadly. The rule currently states that

[Caucus, Avery Law Firm](#) (Solo Practitioner), Michael Shihkitch (Solo Practitioner), [English, Lucas, Priest & Owsley LLP, Covington & Burling](#), joint submission of 309 corporations, ACA [International](#) (“ACA Intl”), the [Sedona Conference](#) Working Group 1 (“Sedona Conference WG1”), and [ARMA](#).

³ The text of the proposed rules can be found on the website for the federal courts:

<http://www.uscourts.gov/RulesAndPolicies/rules/proposed-amendments.aspx>.

⁴ To reinforce this emphasis on proportionality, the proposed rule also would codify the existing practice of using protective orders to allocate discovery costs. Proposed Rule 26(c)(1)(B).

“[r]elevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” F.R.C.P. 26(b)(1). This provision traces back to 1946, when it was added to overcome decisions that denied discovery solely on the ground that the requested information would not be admissible in evidence. This sentence was amended in 2000 to add “Relevant” as the first word. The Committee Note for that 2000 amendment reflected concern that the “reasonably calculated” standard “might swallow any other limitation on the scope of discovery.” Thus, “relevant” was added “to clarify that information must be relevant to be discoverable” Apparently, the 2000 amendment was not enough: some lawyers and judges reading that language have concluded that, since almost any information could potentially lead to relevant and admissible evidence, almost anything is discoverable (if not privileged). Committee on Rules of Practice and Procedure January 2013 Agenda Book (“January 2013 Agenda Book”) at 263-64.⁵ Given the growth in electronically-stored information (“ESI”) and advances in storage capability, such an interpretation has rendered the discovery process unduly burdensome and expensive. *Id.* at 226. The proposed rule is intended to address that problem by narrowing the scope of discovery.⁶

B. Comments on the Proportionality Proposal.

As multiple commentators pointed out, the concept of proportionality has long been embedded in the rules of procedure at the state and federal level. But modern-day practice coupled with the explosion of ESI as a major focus of discovery have overwhelmed this concept of late. Multiple commentators (e.g., Lawyers for Civil Justice) cited well-publicized production and preservation case studies (involving, for example, Allergan, Inc., Altec, Inc., Exxon, Microsoft, Boston Scientific and Bayer Corporation), where millions of dollars and thousands of hours were spent on preserving and producing hundreds of thousands of documents for discovery—of which only a fraction were ever actually used in litigation. See LCJ Supplementary Public Comment 2-3-14.

This substantial imbalance between resources expended and documents used at trial produced a general consensus among commentators that giving additional prominence to proportionality considerations in discovery is beneficial to the goal of making discovery less costly, less burdensome, and more efficient.

As summarized in the comments of the Steering Committee of the Sedona Conference Working Group 1, “[T]hese provisions have the potential to help cabin excessive discovery. Also, these amendments might have some marginal indirect effect on the burden caused by over-preservation.” See Sedona WG1 SC Comment on Proposed Rule Amendments 11-26-13.

⁵ The Agenda Books cited herein can be found on the website for the federal courts: <http://www.uscourts.gov/RulesAndPolicies/rules/proposed-amendments.aspx>.

⁶ To clarify that the provision addressing admissibility does not affect the limits otherwise defining the scope of discovery, the proposed rule 26(b)(1) concludes as follows: “Information within this scope of discovery need not be admissible in evidence to be discoverable.”

Multiple commentators highlighted aspects of the proportionality amendments that could undercut the goals of less costly and burdensome discovery and of dispute resolution on the merits. One such concern regarded the responding party making the preliminary determination of proportionality and how that would flip traditional discovery burdens of proof. Namely, a requesting party, if dissatisfied with the production, would need to show both relevance and proportionality to secure broader discovery—and do so without independent information on the respondent’s data stores or cost of production. Similarly, several commentators expressed concern that there is a natural imbalance in the litigation playing field against plaintiffs—sometimes offset by existing rules allowing broad discovery—that would be exacerbated by adding proportionality to the production standard. Critics predict that the causal effect of the proportionality amendments will be a significant increase in discovery motions disputing the proportional production provided. And critics fear parties will be able to provide incomplete discovery under guise of proportionality and decrease dispute resolutions on the merits. As succinctly put by the Congressional Black Caucus, “The proposed change would fundamentally alter the rules of discovery in a way that would only benefit defendants seeking to evade accountability for wrongdoing” and “parties will be forced to conduct proportionality reviews that will inevitably lead to disputes that require judicial involvement.” See Comment from Marcia Fudge, Members of the U.S. House of Representatives.

A breakdown of the positions taken in the comments surveyed is set forth in the following table.

TABLE 1: POSITIONS ON PROPORTIONALITY

Support	Oppose	Not Specified
309 companies ACA Intl NYCLA Federal Magistrate Judges Association EEOC Covington & Burling ARMA IAALS IAALS & ACTL Lawyers for Civil Justice Sedona Conference WG1	AAJ Employment Rights Section NELA House Judiciary Committee Democrats Congressional Black Caucus Michael Shihkitch (Solo Practitioner) English, Lucas, Priest & Owsley, LLP	Avery Law (Solo Practitioner)

C. Response to Comments.

Although some continue to be concerned about limiting discovery according to the concept of proportionality, it is not new. It already exists in Rule 26(b)(2)(C)(iii). Moreover, a joint submission

from ACTL and IAALS provides a comprehensive summary of different state and federal pilot programs currently incorporating proportionality into the discovery process. See IAALS ACTL Joint Comment 1-28-14. Thus, the Advisory Committee approved the amendment at its Portland meeting, making only non-substantive changes.

II. Rule 37(e) and the Uniform Federal Standard for Sanctions

The other significant change proposed by the Committee concerns revisions to the rules related to spoliation and sanctions. The Committee proposes to scrap the current rule, which was intended to provide a “safe harbor” for limiting sanctions. That rule provides:

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.

F.R.C.P. 37(e) (emphasis added). That rule has been ineffective in providing any sort of “safe harbor” to litigants. Many courts have found “exceptional circumstances” to exist, supporting the imposition of sanctions. Others simply find authority outside the Rules to support a sanctions order. Finally, several others have concluded that the loss of information was not from “routine, good-faith operation[s].” Accordingly, the Advisory Committee found that, in practice, the Rule has rarely been invoked to provide the intended safe harbor. January 2013 Agenda Book at 99; Committee on Rules of Practice and Procedure June 2013 Agenda Book (“June 2013 Agenda Book”) at 33, 98. As a result, the Advisory Committee determined that “the time had come for developing a rules-based approach to preservation and sanctions.” June 2013 Agenda Book at 30-31. The development has taken several forms to date.

A. First Proposed Amendment to Rule 37(e).

The first version of proposed amendments to Rule 37(e) sought to establish “some form of uniform federal rule regarding preservation obligations and sanctions,” June 2013 Agenda Book at 31, that would “provide more significant protection against inappropriate sanctions” for the failure to produce any type of evidence (not just ESI), in order to avoid burdensome and expensive “over-preservation.” *Id.*⁷ The proposed amendment sought to do so in several ways.

First, upon finding that a party failed to preserve evidence, the proposed new Rule presents several options for the court to consider before imposing sanctions, including: permitting additional discovery, ordering the party to undertake curative measures, and requiring the party to pay the reasonable

⁷ See also June 2013 Agenda Book at 93 (“The fundamental thrust of the proposal is . . . to amend the rule to address the overbroad preservation many litigants and potential litigants felt they had to undertake to ensure they would not later face sanctions.”).

expenses, including attorney's fees, caused by the failure. Proposed Rule 37(e)(1)(A), June 2013 Agenda Book at 101.

Second, the proposed amendment set a new standard for the imposition of sanctions. Some case law has interpreted the current Rule to permit sanctions upon a finding of negligence. *See, e.g., Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002). The first proposed amendment would have imposed a uniform, higher standard for federal courts by requiring that the failure to preserve evidence was (1) willful or in bad faith **and** (2) that the loss of information caused substantial prejudice to the litigation. Proposed Rule 37(e)(1)(B)(i). In the absence of those two elements, a court could impose sanctions only if the loss of the information "irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation." Proposed Rule 37(e)(1)(B)(ii). The Draft Committee Note indicates that the "amended rule is designed to ensure that potential litigants who make reasonable efforts to satisfy their preservation responsibilities may do so with confidence that they will not be subjected to serious sanctions should information be lost despite those efforts." Draft Committee Note, June 2013 Agenda Book at 102.

The amended language did not seek to define the concepts of willfulness or bad faith. Those were left to the court to determine, based upon "all relevant factors," including those listed in Proposed Rule 37(e)(2). *See infra*. The Draft Committee Note explained, however, that courts could consider the Rule 37(e)(1) remedies in weighing substantial prejudice. In other words, even upon a finding that a party acted in bad faith, sanctions would not be appropriate if alternative measures could sufficiently reduce the prejudice to the other party. June 2013 Agenda Book at 105.

On the other hand, even absent willfulness or bad faith, a court could have imposed sanctions under this proposal upon a finding that the lack of information "irreparably deprived a party of any meaningful opportunity to present a claim or defense." This safety valve was intended for use only in the truly exceptional case where a party "was disabled from presenting its side in the litigation." June 2013 Agenda Book at 95. Where the lesser measures listed in Rule 37(e)(1) could reduce or cure the prejudice, sanctions would not be imposed. *Id.* at 105.

Although the proposed Rule would preempt state law in diversity cases, it would have no impact upon independent tort claims for spoliation brought under state law. Draft Committee Note, June 2013 Agenda Book at 103. Similarly, the proposed Rule does not prescribe the circumstances under which a preservation obligation would arise. The determination of what evidence must be preserved will continue to be governed by common law. *Id.* Instead, the proposal set forth a non-exclusive list of factors that the court should consider in determining whether a party failed to preserve information that reasonably should be preserved and also whether that failure was willful or in bad faith. *Id.* In making its determination, the court's primary focus should be on the reasonableness of the parties' conduct:

(2) *Factors to be considered in assessing a party's conduct.* The court should consider all relevant factors in determining whether a party failed to preserve discoverable information that should have been preserved in the anticipation or conduct of litigation, and whether the failure was willful or in bad faith. The factors include:

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

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

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

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

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

Proposed Rule 37(e)(2). The Draft Committee Note sought to clarify these factors. First, the concept of reasonableness, as addressed in Rule 37(e)(3)(B), considers the entire scope of a party's preservation efforts. While a litigation hold may be part of those efforts, it is not dispositive. June 2013 Agenda Book at 107. Second, as in Rule 26(b)(1), Subsections 37(e)(2)(C) and 37(e)(2)(D) of the proposal reference the concept of proportionality—a central concern of the drafters. These sections direct that in preserving information, a party's focus should be on the needs of the litigation at hand. A party is not required to comply with a litigant's unreasonably burdensome preservation request, and may consider cost when selecting a means of preservation (provided that the forms of preservation are otherwise comparable). *Id.* The Notes urge "that counsel become familiar with their clients' information systems and digital data—including social media—to address these issues." *Id.* at 108.

B. Comments on the First Proposed Amendment to Rule 37(e).

A large number of commenters focused on Rule 37(e). Spoliation sanctions can often cost millions of dollars or include instructions to juries to draw adverse inferences for spoliation of data. Many commentators therefore maintain the potential severity of spoliation sanctions promotes over-preservation of data, which adds substantially to the costs of discovery and discovery response. "Parties, particularly corporations, lack clear and consistent national guidelines for preservation of information that may be required for discovery. In many cases, corporate parties over-preserve in order to avoid tactical threats of spoliation sanctions. In other cases, parties must simply settle claims or defenses based on the high costs, rather than on the merits of the litigation." See Comment from

309 Companies by Robert Levy, 309 Companies in Support of the Proposed Amendments to the Federal Rules.

To the extent reviewed comments spoke to the sanction topic, the consensus supported the proposed safe harbor standardization. The tenor of consensus support is reflected in the commentary of ACA International: “ACA embraces the main objective of the proposed new Rule 37(e), which is to replace the disparate treatment of preservation and sanctions issues across circuits by adopting a single uniform standard.” See Comment from Robert Föehl, ACA International.

To the extent concerns were expressed regarding the sanctions safe harbor amendments, they regarded concerns that the safe harbor goal could be undercut by vagueness in the wording of the amendments. For instance, regarding the safe harbor exclusion for destructions that caused “substantial prejudice in the litigation and were willful or in bad faith,” the concern is that “willful” is overly vague and has been interpreted by various courts to cover any “intended action.” Under such a definition, it is conceivable that a good faith data management program that included automatic deletion of data of a certain age could be deemed a “willful” deletion that does not qualify for the safe harbor protection. “Ambiguity surrounding ‘willful’ would lead to costly and inefficient ancillary litigation regarding the term’s meaning—which would inevitably result in courts’ adoption of divergent preservation standards that undermine the goal of uniformity,” as stated by Covington & Burling. See Comment from Edward Rippey, Covington & Burling LLP. Recommended fixes included 1) making the standard simply one of bad faith with no mention of willful, or 2) making the standard for sanction “willful and bad faith” action as opposed to “willful or bad faith,” both of which commentators maintained would protect good faith attempts at preservation and production consistent with the sanction rule’s stated goal.

In a similar vein, multiple commentators expressed concern that the other safe harbor exception for destruction that “irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation” was arguably so large as to swallow the safe harbor rule itself. Critics contend that the absence of any requirement for bad faith and willfulness will cause an increase in sanction motion disputes as litigants attempt to wedge “irreparable deprivation” into their destruction sanction motions. More significantly, many commentators noted that the uncertainty created by the “irreparable deprivation” language would “necessitate the same over-preservation of materials imposed by current Rule 37(e), as parties will likely preserve unnecessary and duplicative information to avoid the risk of even inadvertently disposing of material that arguably might ‘irreparably deprive’ another party from litigating its claims.” See Comment from Robert Föehl, ACA International. Recommended fixes included 1) applying a single consistent “willful and bad faith” standard to both exceptions, or 2) eliminating the “irreparable deprivation” exceptions entirely, both of which commentators felt would improve the sanction rule’s standardization and uniform application.

A breakdown of the positions taken in the comments surveyed is set forth in the following table.

TABLE 2: POSITIONS ON STANDARD FOR SANCTIONS

Support	Oppose	Not Specified
309 companies ACA Intl NYCLA Federal Magistrate Judges Association Covington & Burling ARMA Lawyers for Civil Justice Sedona Conference WG1		AAJ Employment Rights Section NELA House Judiciary Committee Democrats Congressional Black Caucus EEOC Michael Shihkitch (Solo Practitioner) English, Lucas, Priest & Owsley, LLP Avery Law (Solo Practitioner) IAALS IAALS & ACTL

C. Changes to the Proposed Amendments.

Before the Advisory Committee met in Portland, it changed its proposed amendment of Rule 37(e) to cover only ESI, not all discoverable information. Then, at the meeting itself, the Advisory Committee presented a new, streamlined version of Rule 37(e) in response to the comments received. The Committee then adopted the following new proposed version of Rule 37(e):

(e) Failure to Preserve Electronically Stored Information

If electronically stored information that should have been preserved in the anticipation of litigation is lost because a party failed to take reasonable steps to preserve the information, and the information cannot be restored or replaced through additional discovery, the court may:

(1) Upon a finding of prejudice to another party from the loss of the information, order measures no greater than necessary to cure the prejudice;

(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.

Given this rulemaking history, the following guidelines for imposing sanctions for loss of information appear clear:

- The Rules do not define when the obligation to preserve ESI attaches, or the scope of that preservation obligation.
- The Rules do not define the “reasonable steps” required to preserve information after that preservation obligation attaches.
- The Court cannot take action to remedy or sanction a failure to preserve ESI unless the party or its attorney fails to take reasonable steps to preserve it.
- The Court cannot award the most extreme sanctions under 37(e)(2) without first making a finding of culpability.
- Absent such bad faith, even the un-curable loss of critical information that deprives a party of any meaningful opportunity to present a claim or defense will not support an award of sanctions.
- This amendment has no impact on state law spoliation claims, and does not apply to documents or discoverable information other than ESI.

III. Additional Amendments to Limit and Streamline Discovery

Together, the amendments to Rule 26 and Rule 37 would operate to reign in a discovery process that many believe has become too burdensome and costly—both with respect to the scope and with respect to a litigant’s preservation obligations. But these do not represent the only major changes to the rules governing discovery. In addition to the major changes concerning the scope of discovery and a party’s preservation obligations, the Committee has also proposed amending several other rules in order to encourage cooperation and speed the discovery process. These include:

- Reducing the time for service to be effected from 120 days to 90 days. Proposed Rule 4(m).
- Reducing the time for a Court to issue a scheduling order. Proposed Rule 16(b)(2).
- Encouraging the use of in-person scheduling conferences with the court. Proposed Rule 16(b)(1).
- Encouraging the discussion of ESI preservation and Fed. R. Evid. 502 agreements in the initial attorney’s conference and the scheduling order. Proposed Rules 16(b)(3) and 26(f)(3).

- Encouraging the initial scheduling order to direct the parties to request a conference with the court before moving for a discovery order (a procedure used successfully in the Southern District of New York). Proposed Rule 16(b)(3).
- Allowing the parties to serve requests for the production of documents under Rule 34 before the initial attorneys' conference specified under Rule 26(f). Proposed Rule 26(d)(2).⁸
- Allowing the parties to stipulate to the sequencing of discovery. Proposed Rule 26(d)(3).
- Requiring a party, in response to Rule 34 requests for production, to make specific objections and to state whether it has withheld any documents on the basis of any asserted objection. Proposed Rule 34(b)(2)(B), (b)(2)(C).

By far the area of greatest consensus among reviewed comments regards the proposed amendments to promote early and active judicial case management. Most reflective of the consensus opinion on this matter are the comments of Avery Law which, while opposed to the proposed amendments as a whole, cites early active judicial case management as a powerful tool for corralling discovery. "Active judicial management," says Avery Law, "can control the expense of discovery far more effectively than relying on the cooperation of the parties." See Comment from Ralph Avery, Avery Law Firm.

Broad consensus notwithstanding, there was at least one area of concern highlighted by commentators regarding these proposed amendments. The concern regards the shortening of the timeframe for issuance of a scheduling order and whether the compressed timeframe may discourage or negatively impact parties' settlement negotiations. As noted by the Federal Magistrate Judges Association, "In many districts this shortened time will get the case on a schedule earlier and at least in theory get it resolved earlier. In other districts, however, this shortened time could have the opposite effect as it may interfere with early court-sponsored settlement discussions and instead place the parties immediately in an adversarial posture." See Comment from Sidney Schenkier, Federal Magistrate Judges Association.

A breakdown of the positions taken in the comments surveyed is set forth in the following table.

⁸ The requests for production would be deemed served as of the date of the initial attorney's conference. The purpose behind this change is to focus the discussions at the initial attorney's conference regarding the scope of discovery, and allow the parties to bring concrete disputes over the scope of discovery to the attention of the court at a Rule 16 conference.

TABLE 3: POSITIONS ON STREAMLINING DISCOVERY AND EARLY COURT INVOLVEMENT

Support	Oppose	Not Specified
309 companies ACA Intl NYCLA NELA Federal Magistrate Judges Association EEOC Avery Law (Solo Practitioner) ARMA IAALS IAALS & ACTL Sedona Conference WG1 Lawyers for Civil Justice		AAJ Employment Rights Section House Judiciary Committee Democrats Congressional Black Caucus Michael Shihkitch (Solo Practitioner) English, Lucas, Priest & Owsley, LLP Covington & Burling

The Advisory Committee adopted the proposals for streamlining discovery and promoting early judicial involvement in discovery, as discussed herein. The Committee rejected proposals to limit the amount of discovery requests and depositions.

In order to reinforce the commitment to reduce cost and promote speed and efficiency reflected in these amendments, the Advisory Committee also recommended a “modest” amendment to Rule 1, making explicit that the Rules should be construed, administered, “and employed by the court and the parties” to secure the just, speedy and inexpensive determination of every action. June 2013 Agenda Book at 71.⁹ While this does not create a new duty to cooperate, commentators generally supported the clear and positive message it sends that speedy, inexpensive and just determinations require each leg of the legal stool—the courts and the litigants—to have an ownership stake in the pursuit of the Rule 1 goals. As aptly summarized in IAALS comments, “All of the research suggests that legal culture is an enormous part of the effective functioning of a particular court system, and the culture involves both the judges and the attorneys.” See 13-CV-00242-Comment, Institute for the Advancement of the American Legal System.

Nonetheless, some commentators did express concern that relying on the cooperative good will of opposing litigants in a system that is foundationally adversarial was ill-advised and would lead to an increase in discovery dispute motions. See Comment from Ralph Avery, Avery Law Firm.

A breakdown of the positions taken in the comments surveyed is set forth in the following table.

⁹ The Note observes that most lawyers and parties already conform to this expectation. June 2013 Agenda Book at 71.

TABLE 4: POSITIONS ON CODIFYING DUTY ON COOPERATION

Support	Oppose	Not Specified
309 companies ACA Intl NYCLA NELA EEOC ARMA IAALS IAALS & ACTL Sedona WG1	Avery Law (Solo Practitioner)	House Judiciary Committee Democrats Federal Magistrate Judges Association Congressional Black Caucus Michael Shihkitch (Solo Practitioner) English, Lucas, Priest & Owsley, LLP Covington & Burling AAJ Employment Rights Section Lawyers for Civil Justice

The Advisory Committee adopted the proposed change to Rule 1.

IV. Impact of the Proposed Rule Changes

The proposed amendments to the Rules discussed herein have emerged from a widespread concern that the discovery process has gotten out of control, overshadowing what should be the real focus of litigation: the merits of the claims and defenses asserted. The changes proposed are intended to address that problem by restricting the scope of discovery, streamlining the discovery process, and reducing the risk of sanctions for the loss of discoverable information.¹⁰ This is an issue of concern not only to lawyers, litigants and courts, but also to all governments, businesses, and other non-governmental organizations facing the prospect of litigation in this country.

For example, record managers are directly impacted by modern-day discovery practice and the rules governing the practice. The data that any organization retains as part of core business functioning is managed by records managers. The bulk of data that any organization must produce as part of a litigation action and discovery response is managed by records managers. The data that must be preserved outside of core business data retention policies as potentially relevant to a litigation action is managed by records managers. And any sanctions that get levied upon an organization for spoliation typically bring unwanted scrutiny on record managers and their policy and procedures. Records managers therefore have a keen interest in the framework for discovery set by the Rules. “As the leading international organization dedicated to information governance, ARMA International has a strong interest in efforts to provide a consistent and predictable national standard applicable to the preservation of information relevant to civil litigation, amendments regarding the possible sanctions

¹⁰ The revised rules also encourage greater judicial oversight of the discovery process. As U.S. District Judge David G. Campbell, the Chair of the Advisory Committee, has noted: these proposals “reflect the need for more effective case management in some courts.” Committee on Rules of Practice and Procedure, January 2014 Agenda Book at 352.

for unintentional failures to preserve, and a clear, reasonable definition of the scope of discovery in civil litigation.” See Comment from Liz Icenogle, ARMA International.

And to that end, ARMA comments fully support the proposed amendments, but echo concerns voiced by other commentators that the amendments defining the scope of permissible discovery, proportionality and sanctions for spoliation would benefit from even simpler, more “bright-line” language.¹¹

The comments make clear ARMA’s vested interest in discovery rules that are uniform, clear, national and recognize that data lifecycle management is central to today’s business operations. In the modern world, data is created, retained according to business need and regulatory obligation, and then destroyed at the end of its lifecycle. And in the opinion of ARMA, “The proposed amendments to Rule 26(b)(1) and Rule 37(e) have the potential to improve the situation considerably and should help information governance professionals make sound, principled preservation decisions without fear caused by the current patchwork of individual judicial preservation standards.” See Comment from Liz Icenogle, ARMA International.

V. Conclusion

On May 29-30, 2014, the Committee on Rules of Practice and Procedure met and voted in favor of the amendments approved by the Advisory Committee on April 10, 2014. The amendments would then become effective on December 1, 2015, if approved by that committee, the Judicial Conference, and the United States Supreme Court, and if Congress does not act to defer, modify or reject them. To keep up with the latest on the progress of the proposed rule amendments, see the website for the federal courts: <http://www.uscourts.gov/RulesAndPolicies/rules/proposed-amendments.aspx>. For additional analysis of these proposed changes, please consult the Section of Litigation website: <http://www.americanbar.org/groups/litigation.html>. Indeed, keeping up with the progress of these proposed changes is advisable. Although these rules would not become effective before December 2015, the message they send to litigants and to the district courts should be clear. In that sense, these revisions may begin to effect the conduct of litigation long before their effective date.

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¹¹ For example, ARMA concurred with other reviewed commentators on the elimination of “willful” from the safe harbor exception in the rule for spoliation sanctions. As those other commentators made note, “willful” has been interpreted by various courts as encompassing “intentional” actions and, if applied to a standard information governance or records management program, could conceivably encompass the end of lifecycle data destruction process which is intentional. The ARMA comments maintain that “good faith” preservation should be the qualification for the sanction safe harbor, and sanctioning should be reserved for clear instances of preservation “bad faith.”

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Cloud Computing: Solutions to E-Discovery Concerns

Maureen M. Japha and Edward H. Rippey



Cloud computing is more than just a buzz term in information technology. It is a legitimate data storage option that can provide real cost savings to companies both large and small. That said, with new technologies come new challenges — and, as we hear from many institutional clients, cloud computing presents unique challenges in the context of e-discovery. This article provides solutions and thoughts relating to some of these concerns.

What is Cloud Computing?

The National Institute of Standards and Technology (“NIST”) defines cloud computing as “a model for enabling convenient, on-demand network access to a shared pool of configurable computing resources (e.g., networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction.”¹ In other words, cloud computing utilizes storage and resources available on the internet, rather than through localized servers owned by an individual company.

There are several different cloud computing service models, but perhaps the most common form – and model most familiar to the everyday user – is known as Software as a Service (“SaaS”). This model is comprised of web applications made available to an organization or individual user that are typically accessed by the user through a web browser.² Under this model, the vendor maintains responsibility for the technical operations and maintenance of the applications, including software updates. Well-known examples of SaaS include Google Docs, Google Calendar, Dropbox, and Gmail.

Cloud computing is an attractive option for many companies who are looking for ways to reduce or eliminate expenses associated with data hosting. Companies that utilize cloud computing are also able to offer their employees the convenience of accessing documents via the internet, rather than through company computers.

E-discovery Concerns Implicated By Cloud Computing

There are however, risks associated with cloud computing – particularly in the e-discovery context. We hear about these risks and concerns from a wide variety of companies. Businesses should take care to

¹ Nat’l Inst. of Standards & Tech., Definition of Cloud Computing (Sept. 2011), at 2, available at <http://csrc.nist.gov/groups/SNS/cloud-computing/>

² *Id.*

consider these risks before transitioning data storage to the cloud. With proper planning and preparation, these risks can be managed effectively.

First, any company looking to transition data to the cloud, must confirm with the service provider that the user retains ownership of the data. Articulating this in the contract between the service provider and the user can avoid the risk of future disputes. Without such a provision, the cloud computing company could be forced to turn documents over to an adversary by discovery request or subpoena. Companies considering transferring data to the cloud should also confirm that the service provider will notify the company of any requests from law enforcement or other third parties, so these requests can be properly evaluated and addressed.³

It should be noted that regardless of how the ownership issue is addressed, because the user retains substantial control over the information, it is unlikely that companies can insulate themselves from e-discovery obligations simply by storing their data in remote servers. Indeed, in the few published opinions where cloud computing is referenced, courts have matter-of-factly identified documents stored on the cloud as part of the ESI encompassed under Fed. R. Civ. P. Rule 34.⁴ There is no reason to think that this will change.

Forward-looking companies should also consider including a contract provision giving customers a right to retrieve data within a reasonable time, and at a reasonable price, to ensure seamless access to data. Such access is essential when faced with time-sensitive e-discovery requests and spelling out these requirements ahead of time can minimize the risk of undue delay. Companies will also want to consider whether they will have continued access to the type of IT services and support that in-house teams provide when faced with litigation. This can include services ranging from preparation of a data map to serving as a 30(b)(6) witness on electronic preservation, collection, and production.

Also critical to the collection process, is ensuring in advance, that data can be collected in a forensically sound and cost-effective manner. For example, consider whether the platform will allow you to apply search terms to identify the potentially relevant data set. In some instances, transferring data to a third party service provider may actually give companies enhanced searching and retrieval capabilities. At least one litigant has argued that access to these enhanced capabilities requires a company to use this technology in the e-discovery context, but a New Jersey District Court recently rejected that argument. See *Koninklijke Philips N.V. v. Hunt Control Sys., Inc.*, No. Civ.A. 11-3684 DMC (D.N.J. Apr. 16,

³ See Matt Nelson, *Moving data to the cloud? The top 5 legal department considerations* (December 13, 2013), [insidecounsel.com, available at: http://www.insidecounsel.com/2013/12/13/moving-data-to-the-cloud-the-top-5-legal-departmen?t=cloud-computing&page=2](http://www.insidecounsel.com/2013/12/13/moving-data-to-the-cloud-the-top-5-legal-departmen?t=cloud-computing&page=2)

⁴ See e.g., *Hinterberger v. Catholic Health Sys., Inc.*, No. 08-CV-380S F, 2013 WL 2250603, at *2 n.2 (W.D.N.Y. May 21, 2013) (“ESI includes electronic mail, or e-mail messages, word processing files, web pages, and databases created and stored on computers, magnetic disks (such as computer hard drives, optical disks (such as DVDs and CDs, and flash memory (such as “thumb” or “flash” drives) and “cloud” based services hosted by third parties via the internet).”); see also *Bender v. Logan*, No. 1:12-CV-956, 2014 WL 496086, at *2 n.4 (S.D. Ohio Feb. 6, 2014) (fact that late-discovered documents were retrieved from cloud storage was irrelevant their being produced late)

2014). In that case, the Court refused to require that a litigant use the enhanced technical abilities of its cloud provider, at least once discovery had already significantly progressed, reasoning that the party's "representations to this Court that its approach to conducting and gathering ESI discovery materials is reasonable" were sufficient. *Id.*

Users should also be proactive about identifying where data is physically located. Many jurisdictions, both domestic and foreign, have unique privacy laws that can be implicated simply by preserving or storing data in a given jurisdiction. Accordingly, to ensure that users do not run afoul of these statutes, it is critical to be mindful of where data is stored and understand the privacy laws that may apply.

Finally, before transitioning to a cloud storage system, security concerns should be fully considered and addressed. Although data breaches can occur regardless of where data is stored, there are steps companies can take to minimize this risk. Companies should take care to do their due diligence and assess the security policies and past performance of cloud providers under consideration. In addition, the user agreement should include a requirement that customers be notified immediately in the event of a breach so companies can take appropriate steps to minimize damage. Furthermore, user agreements that require data encryption where possible provide an additional layer of protection and can offer extra peace of mind for users.⁵

Conclusion

Cloud computing can offer significant advantages for companies — of all sizes and in many industries — looking to reduce costs while providing added convenience for employees. With proper due diligence and preparation, companies can realize the benefits of cloud computing while still ensuring that its e-discovery obligations are satisfied.

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⁵ For other suggestions about improving security of data storage on the cloud, see Cy Morton and Seth Nothrop, *Carrying your umbrella when navigating the cloud* (May 2, 2014) available at: <http://www.insidecounsel.com/2014/05/02/carrying-your-umbrella-when-navigating-the-cloud?t=cloud-computing>

The New ESI Sanctions Framework under the Proposed Rule 37(e) Amendments

By Philip Favro



The debate over the necessity, substance, and form of the proposed eDiscovery amendments to the Federal Rules of Civil Procedure (Rules) has been ongoing now for over four years. Since the Duke Conference convened in May 2010, the Judicial Conference Advisory Committee on the Civil Rules (Committee) has been working to address many of the perceived shortcomings in the current Rules regime.¹ Their efforts have not been conducted in a vacuum. Interest groups representing parties on either side of the “v” in litigation, the U.S. Department of Justice, and even individual federal judges have lobbied the Committee in an effort to shape the final form of the proposed amendments.²

This process, while both lengthy and necessary, may finally be reaching its closing stages. With the Standing Committee on Rules of Practice and Procedure having approved the Rules amendment package this past month, the proposed changes appear to be on track for implementation by December 1, 2015.

Viewed holistically, the proposed changes are designed to usher in a new era of proportional discovery, increased cooperation, reduced gamesmanship, and more active judicial case management.³ For many litigants, however, the amendments of greatest significance are those affecting Rule 37(e). If enacted, the changes to Rule 37(e) would provide a uniform national standard regarding the issuance of severe sanctions to address spoliation of electronically stored information (ESI). They would also introduce a new framework for determining whether sanctions of any nature should be imposed for ESI preservation shortcomings. Simply put, the draft changes to Rule 37(e) are significant. Counsel, clients, and the courts should all be aware of the impact that these changes could have in litigation and on client information governance programs.

This article will analyze these issues. After covering the deficiencies with the current version of Rule 37(e), the article will consider the new sanctions framework under the proposed amendments. This includes an analysis of the factors that parties would be required to satisfy in order to justify the imposition of sanctions. It also describes the severe measures calculated to remediate the most harmful ESI preservation failures, along with lesser sanctions designed to cure prejudice stemming from less egregious forms of spoliation. The article concludes by focusing on some key questions about the Rule 37(e) revisions that remain unanswered and that will likely be resolved only by motion practice.

¹ See JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF ADVISORY COMMITTEE ON CIVIL RULES 306-07 (May 2, 2014) (REPORT).

² See *generally id.* at 95-305, 331-411 (summarizing the nature of the comments the Committee received on the published versions of the proposed Rules amendments).

³ See Philip J. Favro, *A Comprehensive Look at the Newly Proposed Amendments to the Federal Rules of Civil Procedure*, 26-Oct Utah B. J. 38.

The Need for Revisions to Rule 37(e)

The Committee has spent countless hours considering the over-preservation of ESI and the appropriate standard of culpability required to impose sanctions for its spoliation. Even though the current iteration of Rule 37(e) is supposed to provide guidance on these issues, amendments were deemed necessary to address these issues given the inherent limitations with the rule.⁴

As it now stands, Rule 37(e) is designed to protect litigants from court sanctions when the good faith, programmed operation of their computer systems automatically destroys ESI.⁵ Nevertheless, the rule has largely proved ineffective as a national standard. While there are many reasons that could explain its futility, three problems predominate with the present version of the rule.

First, Rule 37(e) did not expressly abrogate the negligence standard that the U.S. Court of Appeals for the Second Circuit implemented for severe sanctions involving preservation failures under *Residential Funding Corp. v. DeGeorge Financial Corp.*⁶ By allowing the *Residential Funding* case to remain in effect, courts in the Second Circuit and beyond were free to impose adverse inference instructions or order other doomsday sanctions for negligent spoliation of ESI.⁷ With the Second Circuit – one of the epicenters of U.S. litigation – following a sanctions touchstone that generally varies from the rest of the country, the rule has failed to become a uniform national standard for ESI sanctions.⁸ Moreover, the Second Circuit’s negligence standard is increasingly viewed as an anachronistic rule given the current challenges associated with ESI production.⁹

The second reason that Rule 37(e) has failed as a so-called “safe harbor” from sanctions is the emphasis the 2006 Committee note placed on requiring litigants to stop the routine destruction of ESI once a preservation duty attached.¹⁰ While litigants may be required to suspend particular aspects of their electronic information systems once a preservation duty is triggered, this is certainly not the exclusive or the determinative factor in every sanctions analysis. As U.S. District Judge Paul Grimm emphasized in *Victor Stanley, Inc. v. Creative Pipe, Inc.*, a court should also consider as part of

⁴ REPORT, *supra* Note 1, at 318.

⁵ Philip J. Favro, *Getting Serious: Why Companies Must Adopt Information Governance Measures to Prepare for the Upcoming Changes to the Federal Rules of Civil Procedure*, 20 RICH. J.L. & TECH. 5, 27 (2014).

⁶ *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2nd Cir. 2002). See REPORT, *supra* Note 1, at 314, 321-22.

⁷ See, e.g., *Sekisui Am. Corp. v. Hart*, 945 F. Supp. 2d 494 (S.D.N.Y. 2013) (relying on *Residential Funding* to impose an adverse inference instruction as a sanction for the plaintiffs’ grossly negligent spoliation of ESI).

⁸ See Philip J. Favro, *Sea Change or Status Quo: Has the Rule 37(e) Safe Harbor Advanced Best Practices for Information Management?*, 11 MINN. J.L. SCI. & TECH. 317, 328-29, 332 (2010) (discussing the Committee’s intent to establish the present version of Rule 37(e) as a national standard when it was implemented in 2006).

⁹ REPORT, *supra* Note 1, at 314 (observing, among other things, that because “ESI is more easily lost than tangible evidence...the sanction of an adverse inference instruction imposes a heavy penalty for losses that are likely to become increasingly frequent as ESI multiplies exponentially and moves to the ‘cloud.’”).

¹⁰ See Favro, *supra* Note 8, at 327-28.

that analysis the “reasonableness and proportionality” of a party’s efforts to preserve relevant ESI.¹¹ Nevertheless, most courts applying Rule 37(e) have instead generally focused on whether and when a party suspended particular aspects of its computer systems after a preservation duty attached.¹² This has led to sanctions rulings that are out of step with mainline ESI preservation jurisprudence.¹³

A final factor contributing to the futility of Rule 37(e) is that courts have frequently used their inherent authority to bypass the rule’s protections.¹⁴ This is because Rule 37(e) only applies to conduct that occurred during the litigation. It does not govern pre-litigation activities such as the destruction of ESI that occurred *before* the commencement of litigation.¹⁵ As a result, courts have often wielded their inherent powers to fashion remedies for ESI destruction free from the rule’s present constraints.¹⁶

With varying preservation standards, the inordinate focus on one factor in the preservation analysis, and the ease in which the rule’s protections can be bypassed, there can be little doubt as to why a revised version of Rule 37(e) is needed.

The Proposed Rule 37(e) Amendments

The proposed amendments to Rule 37(e) are designed to address these issues by providing a straightforward framework for the issuance of any sanctions stemming from failures to preserve relevant ESI. They also encourage courts to draw on a wide range of factors to fashion sanctions awards that cure prejudice caused by less harmful forms of ESI spoliation. In addition, the proposed changes establish “a uniform standard in federal court” for the imposition of severe remedial measures resulting from ESI preservation failures.

The New Sanctions Framework

The Committee has established a set of requirements in the proposed rule that must be satisfied before a court could impose sanctions on a litigant for failing to preserve ESI. The reason for doing so is to ensure that sanctions for preservation failures are based on the designated criteria and not the potentially arbitrary use of a court’s inherent powers:

¹¹ *Victor Stanley, Inc. v. Creative Pipe, Inc. (Victor Stanley II)*, 269 F.R.D. 497, 523 (D. Md. 2010) (observing that an “assessment of reasonableness and proportionality should be at the forefront of all inquiries into whether a party has fulfilled its duty to preserve relevant evidence.”).

¹² See Favro, *supra* Note 8, at 327-28.

¹³ See, e.g., *Phillip M. Adams & Assoc., L.L.C. v. Dell, Inc.*, 621 F. Supp. 2d 1173 (D. Utah 2009).

¹⁴ Thomas Y. Allman, *Dealing with Spoliation in the Federal Rules (Again): The Proposed Amendment to Rule 37(e)*, IAALS/NJC E-Discovery Summit 2013, available at http://iaals.du.edu/images/wygwam/documents/publications/E-Discovery_Panel_2_Preservation.pdf.

¹⁵ *Id.* at 5.

¹⁶ See, e.g., *Escobar v. City of Houston*, No. 04-1945, 2007 WL 2900581, at *17 n.5 (S.D. Tex. Sept. 29, 2007) (describing the circumstances under which courts may exercise their inherent authority).

New Rule 37(e)...authorizes and specifies measures a court may employ if information that should have been preserved is lost, and specifies the findings necessary to justify these measures. *It therefore forecloses reliance on inherent authority or state law to determine whether measures should be used.*¹⁷

The prerequisites that a party must satisfy when moving for sanctions under the amended Rule 37(e) proposal are as follows:

1. Relevant ESI “should have been preserved in the anticipation or conduct of litigation,”
2. Relevant ESI was “lost,”
3. The party charged with safeguarding the lost ESI “failed to take reasonable steps to preserve the information,” and
4. The lost ESI “cannot be restored or replaced through additional discovery.”¹⁸

While the first two steps essentially reflect existing common law requirements,¹⁹ the third step includes a key notion memorialized in *Victor Stanley II*: that preservation efforts must be analyzed through the lens of reasonableness.²⁰ This is a significant step since it would oblige courts to examine preservation issues with a broader perspective and not focus exclusively on whether and when the party modified aspects of its electronic information systems.²¹ Moreover, it would direct preservation questions away from a mythical standard of perfection that has unwittingly crept into eDiscovery jurisprudence over the past several years.²² Instead of punishing parties that somehow failed to preserve every last email that could conceivably be relevant, the rule would essentially require a common sense determination of the issues based on a benchmark – reasonableness – with which courts and counsel are familiar.

The fourth and final provision is significant since it would prevent the imposition of sanctions where there is essentially no harm to the moving party given the availability of replacement evidence.²³

Severe Sanctions vs. Curative Measures

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

¹⁷ REPORT, *supra* Note 1, at 318-19 (emphasis added).

¹⁸ *Id.* at 318.

¹⁹ *Id.* at 319.

²⁰ *Id.* at 319-20.

²¹ *Id.*

²² *Id.* at 320 (“This rule recognizes that ‘reasonable steps’ to preserve suffice; it does not call for perfection.”).

²³ *Id.* (“If the information is restored or replaced, no further measures should be taken.”).

information's use in the litigation."²⁴ This specific intent requirement is designed to create a uniform national standard by ensuring that severe sanctions are imposed only for the most flagrant violations of ESI preservation duties.²⁵ These violations appear to include bad faith destructions of ESI that occur in connection with the instant lawsuit.²⁶ They do not, however, include negligent or grossly negligent conduct. The draft Committee note makes clear that the Rule 37(e) amendments "reject[] cases such as *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2nd Cir. 2002), that authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence."²⁷

The severe sanctions that a court could issue under Rule 37(e)(2) are limited to dismissing the case, entering default judgment, or "instruct[ing] the jury that it may or must presume the information was unfavorable to the party."²⁸ Alternatively, a court could presume that the lost ESI was unfavorable to the alleged spoliator.²⁹ Nevertheless, a court is under no obligation to order any of these measures even if the specific intent requirement is satisfied. As the Committee cautions in the draft note, "[t]he remedy should fit the wrong, and the severe measures authorized...should not be used when the information lost was relatively unimportant or lesser measures...would be sufficient to redress the loss."³⁰

If the moving party cannot satisfy the specific "intent to deprive" requirement, the court could then resort to curative measures under Rule 37(e)(1) to address prejudice resulting from the loss of the ESI.³¹ The sanctions that a court could order pursuant to that provision would be "no greater than necessary to cure the prejudice" to the aggrieved party.³² That wording was drafted broadly to ensure that jurists would have sufficient discretion to craft remedies that could ameliorate the prejudice.³³ While the precise range of these remedies is not delineated in the rule, the draft Committee note suggests the remedies could include the following:

- "[P]reclude a party from presenting evidence,"³⁴
- "[D]eem some facts as having been established,"³⁵

²⁴ *Id.* at 318.

²⁵ *Id.* at 306, 308.

²⁶ *Id.* at 313 ("This intent requirement is akin to bad faith.").

²⁷ *Id.* at 321-22.

²⁸ *Id.* at 318.

²⁹ *Id.*

³⁰ *Id.* at 322-23.

³¹ *Id.* at 318.

³² *Id.*

³³ *Id.* at 321 ("The range of such measures is quite broad . . . [m]uch is entrusted to the court's discretion.").

³⁴ *Id.* at 312.

³⁵ *Id.*

- “[P]ermit[] the parties to present evidence and argument to the jury regarding the loss of information,”³⁶ or
- “[Give] the jury instructions to assist in its evaluation of such evidence or argument, other than instructions to which subdivision (e)(2) applies.”³⁷

Thus, a moving party could very well obtain weighty penalties against an alleged spoliator even if it is unable to establish the specific “intent to deprive.” Nevertheless, the draft Committee note makes clear that any such sanctions must be tailored so they do not equal or exceed the severe measures of Rule 37(e)(2).³⁸

Key Issues for Motion Practice under the New Rule 37(e)

While the new Rule 37(e) proposal addresses the main problems associated with the current rule, there are several questions about the revised rule that remain unanswered and that will likely be the subject of vigorous motion practice. I will consider two of those questions in this section.

What are “Reasonable Steps to Preserve” ESI?

One of the principal battlegrounds under the revised version of Rule 37(e) will certainly involve deciphering the meaning of “reasonable steps to preserve” ESI. This is because the “reasonable steps” provision is an express – though undefined – prerequisite for obtaining sanctions. This is confirmed by the wording of the draft Committee note: “Because the rule calls only for reasonable steps to preserve, it is inapplicable when the loss of information occurs despite the party’s reasonable steps to preserve.”³⁹ Thus, a party who employs “reasonable steps” to keep relevant ESI cannot be sanctioned for its loss.⁴⁰

However, as to the precise meaning of “reasonable steps,” the Committee provides only general guidance. For example, the draft note suggests that sanctions may not be appropriate if the destroyed ESI is either outside of a preserving party’s control or has been wiped out by circumstances (*e.g.*, flood, fire, hackers, viruses, etc.) beyond the party’s control.⁴¹ Nevertheless, the note does not suggest that these *force majeure* circumstances are an absolute defense to a sanctions request. Instead, it advises courts to view the context of the destruction and what steps

³⁶ *Id.* at 321.

³⁷ *Id.*

³⁸ *Id.* (“Care must be taken, however, to ensure that curative measures under subdivision (e)(1) do not have the effect of measures that are permitted under subdivision (e)(2) only on a finding of intent to deprive another party of the lost information’s use in the litigation.”).

³⁹ *Id.* at 320.

⁴⁰ *Id.* (“Because the rule calls only for reasonable steps to preserve, it is inapplicable when the loss of information occurs despite the party’s reasonable steps to preserve.”).

⁴¹ *Id.*

the preserving party could reasonably have taken to prepare for the problem before it occurred.⁴² Engaging in this type of hindsight analysis has its limitations, though, which the Committee acknowledges in the draft note.⁴³

The note also suggests that the range of a party's preservation efforts should be tempered by proportionality standards.⁴⁴ However, as U.S. Magistrate Judge James Francis observed in *Orbit One Communications, Inc. v. Numerex Corp.*, proportionality is an "amorphous" and "highly elastic concept" that may not "create a safe harbor for a party that is obligated to preserve evidence."⁴⁵ Therefore, while notions of proportionality may factor into the preservation analysis, it is unlikely that they alone will determine the issue of "reasonable steps to preserve."

In the absence of meaningful direction on this issue, courts will likely turn to existing case law to help guide their decision on whether a party has or has not taken "reasonable steps" to retain ESI. To be sure, the jurisprudence on this issue is far from uniform. Nevertheless, there are many cases that delineate the acceptable boundaries of preservation conduct.⁴⁶ How those cases are applied under the revised Rule 37(e) will turn – as they always have – on the facts of the case, the quality of counsel's advocacy, and the court's perception of the issues.

What does "Intent to Deprive" mean?

Another likely area of dispute between litigants will be on the meaning of the "intent to deprive" requirement of revised Rule 37(e)(2). While the draft Committee note makes clear that this specific intent requirement does not include negligent or grossly negligent conduct, the question confronting clients, counsel, and the courts is what conduct does it refer to?

The Committee report issued in connection with the Rule 37(e) proposed amendments explains that the "intent requirement is akin to bad faith."⁴⁷ Despite this straightforward explanation, the draft Committee note does not take such a restrictive view. Instead, the note indicates that sanctions under Rule 37(e)(2) are limited "to instances of intentional loss or destruction."⁴⁸ Conduct that is

⁴² *Id.* ("Courts may, however, need to assess the extent to which a party knew of and protected against such risks.")

⁴³ *Id.* at 319 (cautioning generally about the limited perspective that hindsight provides into the nature of a party's conduct).

⁴⁴ *Id.* See Philip J. Favro and Derek P. Pullan, *New Utah Rule 26: A Blueprint for Proportionality under the Federal Rules of Civil Procedure*, 2012 MICH. ST. L. REV. 933, 952 (2012) (citing authorities holding that preservation efforts "must be viewed through the lens of proportionality" and not just the "kaleidoscope of relevance").

⁴⁵ *Orbit One Communications, Inc. v. Numerex Corp.*, 271 F.R.D. 429, 436, n.10 (S.D.N.Y. 2010).

⁴⁶ See, e.g., *Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 1322 (Fed. Cir. 2011) (approving information retention policies that eliminate documents for "good housekeeping" purposes); *Brigham Young Univ. v. Pfizer, Inc.*, 282 F.R.D. 566, 572 (D. Utah 2012) (denying plaintiffs' motion for sanctions since the evidence at issue was destroyed pursuant to defendants' "good faith business procedures").

⁴⁷ REPORT, *supra* Note 1, at 313 ("This intent requirement is akin to bad faith.").

⁴⁸ *Id.* at 322.

“intentional” that results in the spoliation of ESI is not necessarily tantamount to bad faith.⁴⁹ Indeed, that intentional conduct is a lesser standard than bad faith was confirmed by the United States Court of Appeals for the Seventh Circuit many years ago. In 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.”⁵⁰

If the “intent to deprive” requirement does encompass lesser forms of ESI spoliation than bad faith, the question then becomes what is the level of conduct punishable under Rule 37(e)(2)? The answer is that “intentional” spoliations may very well include instances where parties have been reckless or willful in their destructions of ESI.⁵¹ Whether that conduct is sufficient to justify the severe measures that a revised Rule 37(e) authorizes will once again turn on the nature and circumstances surrounding the spoliation. In other words, the courts will again be left to sort out the meaning of a key provision from the rule.

Conclusion

While not every issue associated with ESI preservation failures has been addressed by the Rule 37(e) proposal, it is unrealistic to expect that any rule could do so. Moreover, the revised rule appears to have resolved many of the shortcomings with the current version. By creating a basic analytical framework, widening the analysis to ensure that a broad set of factors are analyzed in connection with preservation conduct, and establishing a uniform standard for severe sanctions, lawyers may finally have a workable paradigm to provide straightforward advice to clients on ESI preservation questions.

Philip Favro brings over fourteen years of expertise to his position as Senior Discovery Counsel for Recommind, Inc. Phil is an industry thought leader, a global enterprise consultant, and a legal scholar on issues such as eDiscovery, information governance, and data protection. Phil’s expertise has been enhanced by his practice experience as a business litigation attorney in which he advised a variety of clients regarding complex discovery issues. Phil is a member of the Utah and California bars. He is an active member of the American Bar Association and also contributes to Working Groups 1 and 6 of The Sedona Conference.

⁴⁹ See *Micron Tech.*, 645 F.3d at 1327 (“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.”).

⁵⁰ *Mathis v. John Morden Buick, Inc.*, 136 F.3d 1153, 1155 (7th Cir. 1998).

⁵¹ See generally *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of America Sec., LLC*, 685 F.Supp.2d 456, 464-65 (S.D.N.Y. 2010) (“*willfulness* involves intentional or reckless conduct that is so unreasonable that harm is highly likely to occur”).

Editor's Message

With this issue, we are well into the fifth year of publishing the *EDDE Journal* each quarter. This issue presents articles from lawyers and technologists focusing on various aspects of leading edge and international e-discovery and forensic practice. The first article was written by frequent contributor Anne Kershaw of Knowledge Strategy Solutions, LLC and first-time contributor Nash Long of Hunton & Williams, describing in detail the proposed and approved changes to the FRCP. The second article is from the team at Covington & Burling LLP led by Edward Rippey, discussing the e-discovery issues involved with cloud computing. The third article is by frequent contributor Philip Favro, explaining the ESI sanctions framework under the proposed changes to the FRCP. Thank you to all of the authors.

The EDDE committee's e-discovery workshops, pre-RSA meetings, the webinars, other face-to-face meetings, and other educational and professional activities are best located on the committee's website and listserv. You will also find the prior issues of this publication there. Please join the committee and volunteer for one of its many activities if you have not already done so.

I continue to ask that all readers of the *EDDE Journal* to share with their fellow professionals and committee members by writing an article for this periodical. Our next issue (Autumn 2014) will come out in September, 2014. There are many of you who have not yet been able to share your experience and knowledge through publishing an article here but please consider doing so to widen the understanding of all of our readers. Every qualified submission meeting the requirements explained in the Author Guidelines will be published, so please feel free to submit your articles or ideas, even if you are not quite ready for final publication. The issue after Autumn (Winter 2015) will be published in December 2014. Until then.