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FEDERAL E-DISCOVERY

FRCP Amendments Take Effect, Impacting E-Discovery Practice

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On Dec. 1, 2015, the long-anticipated amendments to the Federal Rules of Civil Procedure (FRCP) came into effect, reflecting perhaps the most significant federal civil rules changes in decades. The amendments represent the second set of FRCP amendments specifically in response to the explosion of e-discovery in modern litigation, following the much-heralded first such set of amendments in 2006, which introduced us to the term "electronically stored information" (ESI). These new amendments aim to address high impact issues in e-discovery practice including the skyrocketing costs of e-discovery and the existing circuit split over the standard for sanctions for failure to preserve ESI.

Roadmap to Change

The enactment of the new FRCP amendments is the culmination of a multi-year process led by the Civil Rules Advisory Committee (Rules Committee) under the supervision of the Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee). The movement for change began in earnest during Duke Law School's May 2010 conference on civil litigation in federal courts (the Duke Conference),[1] where federal judges, academics, and practitioners analyzed current e-discovery practices and proffered their visions and suggestions for reform.

Originally spurred by the increasing concern over "the costs of litigation, especially discovery and e-discovery,"[2] among other reasons, the Duke Conference participants reached a consensus that several overall changes to the FRCP were necessary, including in the areas of cooperation, proportionality, and case management as well as preservation and sanctions.[3] In response, the Rules Committee tasked two

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subcommittees consisting of judges and lawyers with drafting and vetting proposals for the amendments. The Duke Subcommittee (focusing on overall changes) and the Discovery Subcommittee (focusing on sanctions and Rule 37(e)) drafted the proposed amendments and subsequent revisions, which were eventually adopted by the Rules Committee (April 11-12, 2013) and the Standing Committee (June 3, 2013).

On Aug. 15, 2013, the Standing Committee initiated a six-month public comment period, which resulted in thousands of responses both at public hearings and online.[4] After several significant edits in response to the comments, the updated proposal packet received approval and additional recommendations from the Rules Committee (April 10-11, 2014), the Standing Committee (May 29-30, 2014), and the Judicial Conference (Sept. 16, 2014).

On April 29, 2015, the U.S. Supreme Court approved the amendments and forwarded them to Congress, to take effect, absent any congressional action to the contrary, on Dec. 1, 2015.

E-Discovery-Related Amendments

The FRCP amendments impact Rules 1, 4, 16, 26, 30, 31, 33, 34, 37, 55, and 84 as well as the Committee Notes and Appendix of Forms.[5] Of these, changes to three rules have the greatest potential to impact e-discovery—Rules 1, 26, and 37.

Rule 1.

At the onset of the amendment movement, Rule 1 served as a central focus for additional emphasis on the concepts of proportionality and cooperation.[6] To the potential disappointment of some, while proportionality was given increased focus in Rule 26(b), cooperation was reduced to a mention in the new Committee Note. Rule 1 was amended as follows:[7]

> [These rules] should be construed ~~and,~~ administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.[8]

The new Committee Note explains that the new language aims "to emphasize that just as the court should construe and administer these rules to secure the just, speedy, and inexpensive determination of every action, so the parties share the responsibility to employ the rules in the same way."[9] The Note further states that "[e]ffective advocacy is consistent with—and indeed depends upon—cooperative and proportional use of procedure."[10]

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Rule 26.

A potentially significant change in the new FRCP amendments is an increased focus on proportionality in discovery. Rule 26(b)(1) was amended accordingly:[11]

> ***Scope in General.*** 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. ~~– 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. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).~~[12]

With the quantity of ESI booming, "[p]roportionality continue[d] to be an object of concern, particularly with respect to discovery."[13] Rising e-discovery costs and broadening document requests, among other factors, made it seem "clear that discovery can run beyond what is reasonable," thereby effectuating a need for change.[14] As such, "there was a consensus … on the need for proportionality"[15] with respect to narrowing the scope of discovery. This led to changes emphasizing proportionality within Rule 26(b)(1),

including moving, updating, and rearranging the proportionality factors.

The new Committee Note specifies that returning the proportionality factors from Rule 26(b)(2)(C)(iii) back to Rule 26(b)(1), where they resided before 1993, was done to "restore[] the proportionality factors to their original place in defining the scope of discovery. This change reinforces the Rule 26(g) obligation of the parties to consider these factors in making discovery requests, responses, or objections."[16] Moreover, the new text removes the "reasonably calculated" language that "has been used by some, incorrectly, to define the scope of discovery."[17]

Other changes to Rule 26 include:

• Rule 26(c)(1)(B) adds "the allocation of expenses" for discovery as a permissible topic for a protective order.

• Rule 26(d)(2) "is added to allow a party to deliver Rule 34 requests to another party more than 21 days after that party has been served even though the parties have not yet had a required Rule 26(f) conference."[18]

• Rule 26(f)(3) was "amended in parallel with Rule 16(b)(3) to add two items to the discovery plan—issues about preserving electronically stored information and court orders under Evidence Rule 502."[19]

Rule 37.

Rule 37(e) required a complete overhaul to address the "sense of bewilderment about the scope"[20] of preservation obligations that results in "inefficient, wasteful, expensive, and time-consuming information management and discovery, which in turn adds to costs and delays in litigation."[21] Moreover, the "circuits have developed different approaches to the duty to preserve ESI"[22] as well as to "the degree of culpability required for various sanctions,"[23] as demonstrated in varying sanctions decisions.[24] This spawned the need to resolve the circuit split and to have "a rule establishing uniform standards of culpability for different sanctions"[25] across all jurisdictions.

Despite the "significant support … for more precise guidance in the rules on the obligation to preserve information relevant to litigation and the consequences of failing to do so,"[26] drafting new language proved to be arguably "the most hotly contested area throughout the public comment period."[27] Topics heavily debated included, among others, remedying lost ESI, "curative measures" versus "sanctions," prejudice, and state of mind when having lost ESI."[28] Ultimately, the finalized language not only establishes clear guidelines on preservation and consequences for lack thereof, but also hopes to address concerns regarding escalating e-discovery costs, as "[r]educing the fear of sanctions may reduce the extent of over-preservation."[29]

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Rule 37(e) now states:

> **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 to preserve it, and it cannot be restored or replaced through additional discovery, the court:
>
> (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
>
> (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
>
> (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.[30]

As explained by the new Committee Note:

> [The existing rule] has not adequately addressed the serious problems resulting from the continued exponential growth in the volume of such information. Federal circuits have established significantly different standards for imposing sanctions or curative measures on parties who fail to preserve electronically stored information. These developments have caused litigants to expend excessive effort and money on preservation in order to avoid the risk of severe sanctions if a court finds they did not do enough.[31]

The new rule requires an analysis of whether certain prerequisites have been met prior to even broaching the topic of sanctions, specifically, is it ESI, should the ESI have been preserved, has ESI been lost, did the party fail to take reasonable steps to preserve the lost ESI,[32] and is the lost ESI restorable or replaceable via

additional discovery. Only after having satisfied these conditions may a court consider one of two clearly defined remedies. Under subsection (1), upon a finding of prejudice, the court then may impose curative measures no greater than necessary to cure the prejudice.[33]

Under subsection (2), upon a finding of acting with intent to deprive another party of the ESI, irrespective of prejudice, a court may, upon its discretion, impose one of three listed severe sanctions.[34] As the Note explains, restricting severe sanctions to these circumstances essentially not only "rejects cases such as *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002), that authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence,"[35] but also "forecloses reliance on inherent authority or state law to determine when certain measures should be used."[36] As one former judge noted, under new 37(e), "[n]obody is held to a standard of perfection; it's a standard of reasonableness."[37]

Conclusion

The new FRCP amendments related to e-discovery aim to bring much-needed clarity and guidance on issues that have had a significant impact on modern litigation. While this came from a consensus position that change was needed, looming questions cast some doubt as to the amendments' long-term success. Will the increased focus on proportionality succeed in reducing costs related to discovery or fail by attracting more motion practice on the topic? Will new Rule 37(e) actually result in uniformity across the circuits or open the door for new judicial divergence? Only time will tell if the amendments will have their desired effect.

1. Various materials, empirical research, and submitted papers from the Duke Conference are available at http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/special-projects-rules-committees/2010-civil.

2. Minutes of April 20-21, 2009 Civil Rules Advisory Comm., at 30 (lines 1285-1286), http://www.uscourts.gov/file/15091/download?token=Hxr6Puwp.

3. Report of the Duke Conference Subcommittee of April 10-11, 2014, Agenda Book for April 1, 2014 Civil Rules Advisory Comm., at 79, http://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-civil-procedure-april-2014; see also, Thomas Y. Allman, "The 2015 Civil Rules Package As Transmitted to Congress," June 15, 2015, at 2, http://www.theediscoveryblog.com/wp-content/uploads/2014/10/2015SummaryofRulesPackage.pdf.

4. See written comments, http://www.regulations.gov/#!docketDetail;D=USC-RULES-CV-2013-0002.

5. Proposed Amendments to the Federal Rules of Civil Procedure, http://www.uscourts.gov/rules-policies/pending-rules-amendments.

6. Proportionality and cooperation are concepts often discussed in e-discovery academic circles as being critical to effective and efficient modern litigation. See, e.g., The Sedona Conference, "The Sedona Conference Cooperation Proclamation," 10 SEDONA CONF. J. 331 (2009); The Sedona Conference, "The Sedona Conference Commentary on Proportionality in Electronic Discovery," 11 SEDONA CONF. J. 289 (2010), 14 SEDONA CONF. J. 155 (2013).

7. New rule text is underlined; removed rule text is struck through.

8. Proposed Amendments to the Federal Rules of Civil Procedure, at 1 (lines 4-7), http://www.uscourts.gov/rules-policies/pending-rules-amendments.

9. Fed. R. Civ. P. 1 advisory committee's note.

10. Id.

11. New rule text is underlined; removed rule text is struck through.

12. Proposed Amendments to the Federal Rules of Civil Procedure, at 10-11 (lines 4-30), http://www.uscourts.gov/rules-policies/pending-rules-amendments.

13. Minutes of Nov. 7-8, 2011 Civil Rules Advisory Comm., at 8 (lines 343-344), http://www.uscourts.gov/rules-policies/archives/meeting-minutes/advisory-committee-rules-civil-procedure-november-2011.

14. Id. at 8 (lines 350-351).

15. Minutes of April 10-11, 2014 Civil Rules Advisory Comm., at 5 (lines 189-190), http://www.uscourts.gov/rules-policies/archives/meeting-minutes/advisory-committee-rules-civil-procedure-april-2014.

16. Fed. R. Civ. P. 26 advisory committee's note.

17. Id.

18. Id.

19. Id.

20. Report to the Chief Justice of the United States on the 2010 Conference on Civil Litigation, at 8, http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/special-projects-rules-committees/2010-civil.

21. Id.

22. Minutes of April 10-11, 2014 Civil Rules Advisory Comm., at 17 (lines 699-700), http://www.uscourts.gov/rules-policies/archives/meeting-minutes/advisory-committee-rules-civil-procedure-april-2014.

23. Report to the Chief Justice of the United States on the 2010 Conference on Civil Litigation, at 8, http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/special-projects-rules-committees/2010-civil.

24. For example, "[t]he Second Circuit approved sanctions for negligence or gross negligence … [whereas the] Fifth and Tenth Circuits … allow adverse-inference instructions only if there is enough culpability to support an inference that the lost information was unfavorable to the party who lost it." Minutes of April 10-11, 2014 Civil Rules Advisory Comm., at 17 (lines 704-710), http://www.uscourts.gov/rules-policies/archives/meeting-minutes/advisory-committee-rules-civil-procedure-april-2014.

25. Report to the Chief Justice of the United States on the 2010 Conference on Civil Litigation, at 8, http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/special-projects-rules-committees/2010-civil.

26. Id. at 8.

27. Michele Lange, "FRCP Amendments: The Long and Winding Road," April 21, 2014, http://www.theediscoveryblog.com/2014/04/21/frcp-amendments-long-winding-road.

28. See Minutes of April 10-11, 2014 Civil Rules Advisory Comm., at 18-32, http://www.uscourts.gov/rules-policies/archives/meeting-minutes/advisory-committee-rules-civil-procedure-april-2014; see also Report to the Chief Justice of the United States on the 2010 Conference on Civil Litigation, at 8, http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/special-projects-rules-committees/2010-civil.

29. Minutes of Nov. 7-8, 2011 Civil Rules Advisory Comm., at 15 (lines 694-695), http://www.uscourts.gov/rules-policies/archives/meeting-minutes/advisory-committee-rules-civil-procedure-november-2011.

30. Proposed Amendments to the Federal Rules of Civil Procedure, available at http://www.uscourts.gov/rules-policies/pending-rules-amendments.

31. Fed. R. Civ. P. 37 advisory committee's note.

32. Acknowledging that the rule "does not call for perfection," id., the Note provides guidance on evaluating the reasonableness of preservation efforts by listing several factors for consideration, including proportionality in relation to a party's available staffing and resources dedicated to preservation efforts and choice to utilize more cost efficient measures.

33. With respect to curative measures, the Note explains that the "range of such measures is quite broad if they are necessary," id., ranging from ordering additional discovery from other available sources to more "serious 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 or argument … " Id.

34. The Note explains that a court may, for example, allow "the parties to present evidence to the jury concerning the loss and likely relevance of information and instructing the jury that it may consider that evidence, along with all the other evidence in the case, in making its decision." Id.

35. Id.

36. Id.

37. "Just Follow the Rules! FRCP amendments could be e-discovery game changer," July 17, 2015, quoting Hon. John M. Facciola (Ret.), http://www.metrocorpcounsel.com/articles/32726/just-follow-rules-frcp-amendments-could-be-e-discovery-game-changer.