

Preparing for Electronic Discovery in Litigation

The largest cost in litigation is discovery, an ever-growing percentage of which is electronic discovery (“e-discovery”). A 2012 study by the RAND Institute for Civil Justice found that the median cost for producing electronically stored information (“ESI”) in the cases studied was \$1.8 million.¹ And these expenses are only increasing. In response, the Federal Rules of Civil Procedure (FRCP) have been amended several times in recent years, with the latest amendments taking effect on December 1, 2015. These changes have already begun to significantly impact the scope and costs of discovery, including e-discovery—particularly due to the renewed emphasis on the need for “proportionality.”

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Given the prevalence of electronic data and the myriad ways in which it is stored, combined with the shifting landscape of federal discovery rules, it is critical that attorneys and their clients educate themselves on the applicable rules and their practical implications for ESI and e-discovery in litigation.

Electronic Discovery Rules

The 2015 Committee Notes to the amended FRCP acknowledge the explosion of information and ESI, as well as advancements in technologies that are occurring. For instance, the notes to amended Rule 26(b)(1) state that “[c]omputer based methods of searching such information continue to develop, particularly for cases involving large volumes of electronically stored information,” and “[c]ourts and parties should be willing to consider the opportunities for reducing the burden or expense of discovery as reliable means of searching ESI become available.”

The 2015 amendments to the FRCP were designed to accomplish three primary goals: (1) clarify the consequences for failing to preserve ESI; (2) stress the importance of the proportionality principle in resolving discovery disputes; and (3) expedite litigation. As they relate to e-discovery, the amended rules can be grouped according to changes that affect cooperation, the pace of discovery, proportionality, cost allocation, responses and objections to document requests, and failure to preserve.²

COOPERATION

Amended Rule 1 provides that the civil rules are to be “construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.” The 2015 Committee Notes on this rule, as amended, emphasize that the “parties share the responsibility to employ the rules in the same way,” and that “[e]ffective advocacy is consistent with—and indeed depends upon—cooperative and proportional use of procedure.” The 2015 Committee Notes further advise that Rule 1 neither creates a new or independent source of sanctions nor abridges the scope of any other of the Federal Rules.

DRIVING THE PACE OF DISCOVERY

Unnecessary delays, lack of planning, or non-cooperation at the outset of a case can result in inefficiency and expense. The amendments to Rules 4, 16, 26, and 34 address these problems by shortening timelines and requiring parties to identify and discuss discovery issues early in the course of litigation.

Amended Rule 4(m) reduces the time permitted to serve a defendant with a summons and complaint from 120 days to 90 days. If service has not occurred within the prescribed period, then the court must either dismiss the action without prejudice or order that service be completed by a certain date. The 2015 Committee Notes advise that this change, together with the shortened times for issuing a scheduling order set by amended Rule 16(b)(2), will reduce delay at the beginning of litigation.

To further reduce delay at the outset of a case, amended Rule 16(b)(2) requires courts to issue a scheduling order 90 days after any defendant is served, or 60 days after any defendant makes an appearance, whichever is earlier. Issuance of the scheduling order may be delayed, however, if the court finds good cause.

Amended Rule 16(b)(1), aimed at encouraging productive discussions during the scheduling phase, removes the former rule’s reference to conferences being conducted by “telephone, mail, or other means.” The 2015 Committee Notes explain the deletion of this language, particularly discussions by mail, by stating that “[a] scheduling conference is more effective if the court and the parties engage in direct simultaneous communication.”

Amended Rule 26(f)(3) adds “preservation” and “privilege” as topics to discuss at the Rule 16 conference. The amended rule requires parties to discuss whether they will seek an order under Federal Rule of Evidence 502—a valuable but underutilized rule that allows courts to prevent waiver of privilege. A coordinating amendment to Rule 16(b) explicitly allows scheduling orders to include terms related to preservation and Rule 502 orders.

To further facilitate discussions during the Rule 26(f) conference, amended Rule 26(d)(2) permits the parties to serve document requests under Rule 34 before the conference, but no earlier than 21 days after service of the summons and complaint. This change to the former rule, which prohibited any discovery requests before the Rule 26(f) conference, allows the parties to address issues presented by the document requests at the Rule 26(f) conference. The early Rule 34 requests will be considered served at the first Rule 26(f) conference.

Finally, amended Rule 16(b) allows a scheduling order to include terms requiring the parties to confer with the court before bringing any discovery-related motions.

PROPORTIONALITY

Discovery under former Rule 26(b)(1) was extraordinarily broad: parties could obtain information “regarding any nonprivileged matter that is relevant to any party’s claim or defense,” including any information that “appears reasonably calculated to lead to the discovery of admissible evidence.” With the increasing volume of data created and maintained by companies, significant time and money can be spent responding to discovery requests. When the parties have similar discovery exposure, they each have an incentive to narrow discovery without court intervention. Such self-regulation does not exist, however, when the parties’ discovery obligations are asymmetrical. Former Rule 26(b)(2)(C) required the court to limit discovery when it found that the “burden or expense of the proposed discovery outweighs its likely benefit,” but discovery limitations were rarely raised by the court on its own and, when objections to scope were raised by a producing party, courts were reluctant to impose restrictions.

Under the amended rule, the Committee made a few significant changes to combat the problems

associated with asymmetric discovery. Amended Rule 26(b)(1) limits discovery to relevant, non-privileged information that is “proportional to the needs of the case.” The rule lists relevant proportionality considerations as “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.”³ As amended, Rule 26(b)(1) no longer includes language to the effect that discovery may include any information “reasonably calculated to lead to the discovery of admissible evidence.”⁴

COST ALLOCATION

Former Rule 26(c)(1) authorized protective orders to preclude unduly burdensome or expensive discovery. Although not stated in the former rule, courts could issue protective orders that allocated some of the cost to the requesting party. Because the former rule was silent on cost allocation, parties sometimes disputed the court’s authority to shift costs. Amended Rule 26(c)(1) states that the protective order may include “specifying terms, including time and place or the allocation of expenses, for the disclosure of discovery.” As the 2015 Committee Notes explain, “[e]xplicit recognition [of cost shifting] will forestall the temptation some parties may feel to contest this authority.” The Committee was careful to note, however, that this change does not alter the standard practice of having the responding party bear the cost of responding to discovery requests.

RESPONSES AND OBJECTIONS TO DOCUMENT REQUESTS

Parties responding to Rule 34 production requests typically list a litany of objections and often fail to specify whether any of the stated objections will be relied on as grounds to withhold any of the documents sought by the requesting party. Amended Rule 34 requires responding parties to state the specific grounds on which the party is objecting and whether any documents are being withheld on the basis of a given objection. The Committee intended for this change to facilitate meaningful meet-and-confer discussions between the parties.

FAILURE TO PRESERVE

The ability of courts to sanction a party for the spoliation of evidence is limited under the FRCP. Former Rule 37(e) permitted such sanctions, but only when a party failed to provide electronically stored information in violation of a court order. Because former Rule 37(e) applied to such a narrow set of circumstances, courts turned to their inherent authority or state laws to sanction parties for their failure to preserve evidence resulting in disparate standards for what constitutes a party's duty to preserve and wide-ranging sanctions for violations of that duty. Without clear guidance on what sanctions might be imposed for the spoliation of evidence, companies often over-preserved data to avoid the risk of severe penalties.

To provide clarity and consistency on sanctions for failure to preserve, amended Rule 37(e) was completely rewritten. Under amended Rule 37(e), the court may impose sanctions on an offending party for failing to preserve ESI where the ESI (1) "should have been preserved in the anticipation or conduct of litigation"; (2) is lost "because a party failed to take reasonable steps to preserve it"; and (3) "cannot be restored or replaced through additional discovery." If these three conditions are met, the court will determine whether or not another party is prejudiced by the offending party's loss of the ESI. Under amended Rule 37(e)(1), the court may impose "curative measures" on the offending party based on a finding that another party was prejudiced from losing the information, but such measures may be "no greater than necessary to cure the prejudice." Under amended Rule 37(e)(2), if the court determines that the offending party "acted with the intent to deprive another party of the information's use in the litigation"—regardless of prejudice—then the court may (a) presume that the lost information was unfavorable to the offending party, (b) instruct the jury that it may or must presume the information was unfavorable to the offending party, or (c) dismiss the action or enter a default judgment.

Thus, under the amended rule, sanctions are not permitted if evidence is lost despite a party's reasonable efforts to preserve it. Further, even if a party failed to try to preserve information, sanctions are not automatic. Under amended Rule 37(e)(1), a court may order "curative measures," but only upon a finding that another

party was prejudiced from losing the information. More severe sanctions, such as an adverse inference or the entry of default judgment, are permitted under amended Rule 37(e)(2), but only when the court finds that a party "acted with the intent to deprive another party of the information's use in the litigation."

* * *

The amendments to FRCP encourage early and enhanced case management and cooperation, which should provide an opportunity for counsel who are familiar with a client's electronic systems and well-versed in the real world issues of discovery to obtain substantial savings in time and money. The amendments relating to proportionality and sanctions may result in a reduction in the costs associated with overly broad discovery and over-preservation of data. It is important to note, however, that the amended rules do not altogether eliminate the reality of asymmetric discovery. The notes acknowledge that one party may have more information than another and will therefore often bear a heavier burden in responding to discovery. Nevertheless, the amendments' focus on cooperation and proportionality in e-discovery provides a springboard by which to engage with the other side early on in discovery. It also encourages active judicial management of discovery to resolve disputes.

Litigation Methods

LITIGATION HOLDS

The most common litigation method involving e-discovery is the litigation hold. A litigation hold is a request to preserve electronic evidence, usually in the form of a letter or email. Litigation holds are triggered "[o]nce a party reasonably anticipates litigation." *Zubulake V*, 229 F.R.D. 411, 431 (S.D.N.Y. 2004); see *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 256, 461 (S.D.N.Y. 2010); see also 29 C.F.R. § 1602.14 (requiring preservation of "evidence [that] may be relevant to future litigation"). The point when litigation becomes "reasonably anticipated" can depend on a variety of factors, but some actions—such as an employee filing a charge with the EEOC—can trigger the duty to preserve. See *Scalera v. Electrograph Sys., Inc.*, 262 F.R.D. 162, 171 (E.D.N.Y. 2009). Generally, a litigation hold notice should be issued when, based on the known facts and circumstances, counsel know of (or

reasonably anticipate) (1) a lawsuit or other dispute, claim, or contested matter that has been (or will be) commenced by or against the corporation; (2) a subpoena or other request for documents or information that has been (or will be) directed to the corporation; or (3) a formal or informal regulatory investigation that has been (or will be) commenced against the corporation.

When informing a client about a litigation hold, an attorney should make sure to send a formal, written litigation hold notice that clearly defines the scope of information requiring preservation. This requires an attorney to have an understanding of the relevant time frame, the important individuals, and the key documents that may be relevant to the case, while also considering proportionality regarding the client's burden and expense in preserving data. Because of this, an attorney should also make efforts to gather information about the client's technological capacities so as to anticipate any e-discovery issues that may arise in the case. The hold letter should describe the nature of the litigation and all criteria detailing the information to be preserved, identify likely locations of relevant information, outline steps to be taken for preserving the information, and convey the significance of the obligation to the recipients. At a minimum, the letter should be sent to the key witnesses, data custodians, Human Resources, Records Management, and IT departments, though an attorney may wish to send the letter to others in the organization as well.

In addition, an organization can compile a data source catalog as a guide for counsel to key data systems that may be subject to legal holds. This can be a compilation of fact sheets on key data sources likely to be relevant across multiple litigations and investigations. There may be a core set of applications typically involved in the routine cases and more specialized systems and applications which need to be analyzed for more complex matters. Typical categories for a data source catalog includes information relating to data sources, business areas, key contacts, key functionalities, inputs, outputs, data ranges, retention policies, data preservation, and backup schedules, among others.

If a party fails to preserve electronic information, the aggrieved party can seek sanctions for spoliation under certain circumstances. *See* Section 1, *supra*, and Section 5.c., *infra*.

METHODS IN EMPLOYMENT LITIGATION

Employment litigation, which may occupy as much as 25 percent of an organization's active litigation case load, presents discovery challenges because the employer controls nearly all of the relevant evidence. The employer's burden is large because relevant data and documents can touch every operational aspect of a company, and it is often difficult to identify and gather this information until more is known about the plaintiff and the claims. Not only are employment records usually maintained exclusively by the employer, but emails contained in the company's email system, which is controlled by the employer, can be the only contemporaneous record of the facts and the opinions expressed about the issues in dispute. Because the cost of reviewing and producing the relevant data is often high relative to the potential damages at issue, employers sometimes settle cases early, even before an evaluation of merit is made. The employer should first consider what data or documents are potentially relevant to the litigation and will be appropriate to include in a litigation hold and to consider for collection, review and production. Relevant data sources may include:

- **Emails:** Emails between an employee and management are often used offensively and defensively in employment cases. Emails may also provide evidence of employee misconduct or poor performance.
- **Computer data:** Internet records, printing records, copying or duplication records, telephone records, instant message or chat room records, and data recovered from an employee's work computer may all contain relevant information.
- **Data from personal digital assistants (PDAs), cell phones or "smart phones":** These devices may provide a key source of data if they were not synched with an organization's email system, and, even if they were synched, there may be communications between such devices that did not go through the email system. Text messages, if retained by the organization, may also be a relevant source of discoverable ESI.
- **Personnel files:** Information contained in personnel files is often relevant in employment litigation. Care should be taken to identify and collect all of the relevant information, as components of

the personnel files may be spread across various offices and supervisors.

- **Operational data:** Operational data such as parking records, building entrance or egress records, video surveillance, computer log-on and log-off data, elevator access and log-on data for individual software programs may be important in defending claims in employment litigation.
- **Administrative data:** Administrative materials such as training verifications and manuals, timekeeping, benefits, payroll and performance information are frequently relevant in employment litigation. These materials are often maintained in different departments and not centrally located within the organization.
- **The home computers or other personal device:** Defendants sometimes may obtain discovery of information contained on a plaintiff's home computer or other personal devices. Depending on the circumstances, data from the home computers or other personal devices of other employees may also be relevant.

In addition to the data sources listed above, employers should consider the data sources listed in the Federal Judicial Center's "Pilot Project Regarding Initial Discovery Protocols For Employment Cases Alleging Adverse Action" (Nov. 2011), *available at* [http://www.fjc.gov/public/pdf.nsf/lookup/DiscEmpl.pdf/\\$file/DiscEmpl.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/DiscEmpl.pdf/$file/DiscEmpl.pdf), which introduced pretrial procedures for certain types of federal employment cases in order to encourage more efficient and less expensive discovery. These protocols, which are currently being tested in select U.S. district courts, create a new category of information exchange, replacing initial disclosures with initial discovery specific to employment cases alleging adverse action.

Practical Information System Policies and Practices

Companies should maintain a written document retention policy that guides how long the company retains certain information, whether in paper or electronic form. This policy should allow for the retention of documents and ESI for at least the length of any relevant statute of limitations. As an example, Section 1602.14 of the Department of Labor regulations requires that "[a]ny personnel or employment

record . . . shall be preserved by the employer for a period of one year from the date of the making of the record or the personnel action involved, whichever occurs later." 29 C.F.R. § 1602.14 (as amended in 2012).

The Sedona Conference offers four key guidelines for determining an email retention policy.⁵ First, an organization should develop a team approach to reflect the input of functional and business units, ideally spearheaded by an interdisciplinary team designed to assess the entity's email retention policy. Second, the team should develop a current understanding of the email retention policies actually in use within the entity, with the goal being to identify any practical gaps between existing retention policies and actual practices. Third, it should select features for updates or revisions of the email retention policy with the understanding that a variety of approaches can be valid, depending on varying sizes, complexities, and policy priorities. And finally, any technical solutions should meet the functional requirements identified as part of the policy development and should be carefully integrated into existing systems.

An employer should be mindful of special challenges surrounding the preservation and collection of data for terminated or former employees. The employer should ensure good communication among its human resources (HR), information technology (IT), and records management departments so that any requirement to retain data of a terminated employee is captured. The employer should consider establishing a protocol whereby its IT department confirms with its records management or HR department before wiping a hard drive, recycling a laptop computer or deleting an email box for a terminated employee. An increasingly sensitive area is the conflict between the employer's desire to redeploy the laptops or workstations of employees who leave the company and the need to preserve potentially relevant data.

Companies should also develop a comprehensive written policy dealing with the treatment of "disaster recovery data," or information preserved for use in the event that an emergency damages or destroys an organization's primary data retention system. Such a policy should provide "rational and defensible guidelines" for managing stored information, and should be created after considering the relevant business, regulatory, tax, information management, and

infrastructure needs of the organization. Sedona Principles, cmt. 1.b. In addition to these general guidelines, an organization should also take into account relevant laws or regulations requiring the preservation of certain types of data; some heavily regulated industries may face specialized rules governing the retention of electronic data.

Preparing for the Rule 26(f) or Initial Scheduling Conference

The FRCP require that preparation for e-discovery begin before the parties have served discovery. By the time a Rule 26(f) or initial scheduling conference approaches, relevant ESI should already have been preserved by parties and their counsel if they have taken the appropriate steps as recommended above, such as issuing a litigation hold notice. After taking such reasonable steps to preserve ESI, counsel should also create an organized discovery plan and contact opposing counsel to discuss ESI issues prior to the Rule 26(f) or initial scheduling conference. Early discussions of ESI issues can help to limit unnecessary discovery disputes and motion practice down the line, as well as head off potential motions for sanctions based on alleged failure to properly preserve ESI.

Counsel should make early and diligent preparation to adequately represent their clients' positions with respect to ESI, including by becoming familiar with their clients' information systems before the Rule 26(f) meet and confer. Some of the issues to discuss at this early stage of the litigation include: discovery topics and time period; key personnel likely to have discoverable information; identification of accessible and inaccessible sources of ESI, as well as the burden and cost associated with retrieving and reviewing such information; preservation of ESI; form (or forms) in which ESI will be produced (including metadata), as well as any unique data types or proprietary software involved; ESI collection and review protocol, including date limitations, deduplication, search terms, and/or predictive coding (technology assisted review); protocols for addressing privilege and work product; and protocols for confidentiality or privacy concerns (particularly data privacy laws and protective orders) with respect to potential exchange of ESI.

Failure to prepare for and engage in these meaningful discussions with opposing counsel regarding

e-discovery and the preservation, review, and production of ESI can damage counsels' credibility and their clients' interests in subsequent discovery disputes.⁶ Diligent consideration of these issues early on in the case prepares counsel and their clients to engage in and respond to e-discovery. Moreover, well-informed counsel at Rule 26(f) and initial scheduling conferences will be better equipped to convince the court and opposing parties of the reasonableness of their position, while also building credibility and avoiding costly over-preservation or production. Putting e-discovery issues in front of the court early in the case also helps apprise the judge of anticipated obstacles that may arise through the discovery process with regard to ESI.

Preparing Requests and Responding to Discovery Requests Involving Electronic Data

PREPARING REQUESTS

Despite the fact that the changes to amended Rule 26(b)(1) have been in effect for only several months, there are already hundreds of opinions citing the amended rule. Not surprisingly, parties have been quick to make proportionality arguments on the propriety of their discovery requests and objections, and a body of case law on the issue is quickly building. In some instances, courts are engaging in proportionality analyses without either party having raised the issue. A few months in, some themes are beginning to emerge from the case law.

First, the rule change has caused many courts to more closely examine the fit between the discovery being sought and the stakes at issue in the litigation. Indeed, that was the stated purpose of the rule change. As some courts are rightly pointing out, proportionality has long been a legitimate consideration in managing discovery. And, as those courts note, amended Rule 26(b)(1) places a renewed emphasis on proportionality.⁷ The amendment relocates and emphasizes the proportionality factors and "encourage[s] judges to be more aggressive in identifying and discouraging discovery overuse." This, some courts have concluded, makes proportionality considerations much harder to ignore than before. A common theme in the cases is that the courts appear to be taking the amended rule as a directive to be tougher on overreaching discovery requests.

Another emerging theme relates to how courts are analyzing proportionality in light of the relevance of the information being sought. For instance, some courts have suggested that proportionality is a threshold issue to be resolved before even relevance or privilege is considered while others focus on relevance and proportionality in relation to each other.⁸ What is clear, however, is that courts are analyzing proportionality in conjunction with and, sometimes, before relevance arguments.

What has largely been absent from the cases so far is any quantitative weighing of the cost of discovery against the amount in controversy. And, finally, courts continue to analyze burden objections on a request-by-request basis, and they continue to urge parties to attempt compromise prior to litigating discovery disputes.

CONSIDERATIONS AND EARLY LESSONS

Courts are taking the renewed focus on proportionality in Rule 26(b)(1) to heart and parties will increasingly be availing themselves of or defending themselves against proportionality arguments. As such, there are some early lessons from the vanguard of proportionality cases.

First, most courts seem disinclined to engage in macro-level proportionality analyses or even weigh the amount in controversy against the cost of the discovery sought. Rather, courts seem more inclined to conduct a request-by-request proportionality and burden analysis. And so counsel should be prepared to make request-specific burden and proportionality arguments. Likewise, counsel should consider less-burdensome alternatives to responding to discovery requests and be ready to present those to opposing counsel and the court.

Second, and related, courts continue to urge compromise on discovery disputes, and they seem to be less receptive to burden arguments when consideration has not been given to less-burdensome alternatives. Indeed, all parties have a duty to cooperate. Though some of the recent proportionality case law speaks to whether one party has the burden of proving proportionality or the other,⁹ courts expect both sides to have thought about the burden of the discovery being sought and whether there are less burdensome means of getting the same information.

Third, courts continue to analyze discovery burden in light of relevancy and necessity, although now with a clear focus on proportionality. However, some courts do not seem inclined to engage in a proportionality analysis in a vacuum. Rather, the requested discovery is often weighed against the relevance it has to the litigation and how necessary it is to the parties' abilities to assert their claims and defenses. What is new is the emphasis courts are giving to the fit between the discovery being sought and the stakes at issue in the litigation. As a result, counsel should be ready to argue proportionality both as a stand-alone matter and in the broader context of relevance and necessity.

Finally, it is a good practice to raise discovery disputes early in litigation, and proportionality issues are no different.

RESPONDING TO DISCOVERY REQUESTS

Keyword searches are among the most common automated tools for fulfilling the obligation to conduct a diligent search for documents potentially responsive to a request for production. As technology in the e-discovery space continues its rapid development, there has been a great deal of discussion about the most effective, and most defensible, uses of keyword searches. Cooperation with an opposing party, of course, is one way to develop and structure keyword searches. In addition, there are a number of techniques or methodologies that may be useful in validating the effectiveness of keyword searches.

The key to developing and properly testing effective search terms is having a clear purpose for their use. If the purpose for the keyword search is to identify the "hot" documents for an investigation (i.e., the needle in the haystack), then the keyword search should focus narrowly on specific topics. But if the purpose is to create a cost-effective and defensible review population, then the keyword search should focus on capturing the relevant and material information from the larger volume of data collected. And if the purpose is an initial collection, it may be appropriate to use broad search terms in the first instance, and then employ narrower search terms later in the process to target documents that may be responsive to specific requests.

In addition, designing a keyword search requires constant balancing of the materiality of issues in a

matter and the risk of being under- or over-inclusive. For example, a date range or time period restriction will often be an appropriate way to exclude per se irrelevant information and avoid over-inclusion. Similarly, limiting the review population to information collected from particular company employees (“custodians” in e-discovery jargon) will also often be appropriate. But any judgment call must be made with an eye to maintaining the proportion between the cost of discovery and the information’s importance to the case. The standard for discovery is reasonableness—not perfection—and the same is true for the use of keyword searches in e-discovery.

STRATEGIES FOR DEVELOPING, TESTING AND USING KEYWORD SEARCHES

- **Effective Collaboration:** Lawyers, especially at the outset of a legal matter, may not have sufficient information to identify a full set of potentially useful search terms. Clients know the subject matter, the words used to convey key concepts and nuances in the language employed. Collaboration with lawyers, clients, e-discovery experts and, if appropriate, the requesting party in developing search terms is critical to managing the risks and costs associated with a large document review.
- **Understand the Search Process and Technology:** Developing effective search terms takes time, effort, diligence, creativity, flexibility and, above all, sound judgment. It is important to work with individuals knowledgeable in the use of search terms in order to understand how best to test and refine the search terms and how to use the available technology to its greatest advantage. Having a well thought out, clear process for designing and testing a search that takes into account the available technology may provide an important strategic advantage if the search is challenged.
- **Test and Reevaluate:** Remember that the reasonableness of any set of search terms often depends on testing and evaluation of those terms. Developing keyword searches is an iterative process, and the initial set of search terms may need to be expanded, or contracted, over time as the legal matter develops and more information becomes available. Be prepared both to consider modifications to any set of keyword terms and to defend against attempts to expand or contract search terms where necessary.
- **Consider Sampling:** If circumstances allow for it, use sampling on large data sets to help better define the review population and test search terms. Experts and technology (usually available at e-discovery vendors) may help you develop appropriate sample sizes and random sample selections.
- **Consistency in Approach:** Consistency and documentation are key elements to defending any keyword search process. Parties should record the search terms they ultimately select for use in the overall document population and their reasons for choosing them.

RECENT TRENDS IN THE APPLICATION OF AMENDED RULE 37(E) CONCERNING SPOILIATION SANCTIONS WHEN RESPONDING TO DISCOVERY REQUESTS

Amended Rule 37(e) was designed to address concerns about the consistency and proportionality of sanctions. In applying the amended Rule, district courts are issuing more predictable decisions for those parties that take “reasonable steps” to preserve their ESI information. Consequently, courts appear to be applying amended Rule 37(e) by crafting proportionate, “middle ground” curative sanctions when there is prejudice but no showing of intent to deprive.¹⁰ In addition, courts to date are not imposing preclusive sanctions absent a showing that the offending party acted intentionally and was not merely negligent with regard to lost ESI.

“CURATIVE MEASURES” UNDER AMENDED RULE 37(E)(1)

In a recent case in the Northern District of California, the court imposed “curative measures” as sanctions under Rule 37(e)(1) where the plaintiff lost certain electronically stored communications and had made no effort to preserve documents. Because of the plaintiff’s “lackadaisical attitude towards document preservation,” the court determined that spoliation had occurred and the defendant had been prejudiced. Consequently, the court expanded the scope of evidence that the defendant would be allowed to bring to trial and awarded reasonable attorney’s fees.¹¹

PRECLUSIVE SANCTIONS UNDER AMENDED RULE 37(E)(2)

Courts have found that although a judge may impose the severe measures set out in Rule 37(e)(2) when there is an intent to deprive—regardless of

prejudice—the court is not required to impose any of these measures. The bottom line in sanctioning a party is that the remedy should fit the wrong to be redressed. Thus, several courts have determined that dismissal of an action is not an appropriate sanction even when a party has willfully destroyed data.¹²

COURTS CONTINUE TO EXERCISE “INHERENT AUTHORITY”

Consistent with the Advisory Committee’s Notes that the amended Rule forecloses reliance on inherent authority or state law to determine sanctions, some courts have declined to impose a sanction under “inherent authority” where ESI was lost. For example, one court determined that it could not rely either on amended Rule 37(e) or on its “inherent authority” to make an adverse inference instruction where the offending party was ultimately able to restore and produce the lost ESI.¹³ Other courts, however, have determined that a court’s inherent power to sanction litigants remains even if the standards of Rule 37(e) are not met; these courts interpret the committee notes to mean only that a court cannot rely on inherent authority to impose sanctions expressly prohibited by amended Rule 37(e), such as dismissal of a case for merely negligent destruction of evidence.¹⁴

However, when evaluating spoliation claims involving a non ESI tangible document or evidence, courts have questioned whether they should continue to rely on “inherent authority” and spoliation case law, even if the standards differ from the new spoliation standards established in Rule 37(e). Further, courts have questioned what constitutes ESI under amended Rule 37(e), noting that the Rule does not precisely define the term. For example, one court has inquired whether videotapes count as ESI,¹⁵ and another court has determined that text messages do constitute ESI.¹⁶

COURTS MAY APPLY AMENDED RULE 37(E) RETROACTIVELY

Recent decisions have been mixed as to whether a court will apply amended Rule 37(e) retroactively. For example, one court imposed the previous standard for assessing the need for spoliation sanctions because the case had been filed more than two years before the amended Rule went into effect; the plaintiff was representing himself pro se; and discovery had

already closed before the amendment. Consequently, although the court determined that the defendants’ loss of ESI was grossly negligent but not intentional, the court granted the plaintiff’s request for mandatory and permissive adverse inference instructions with respect to the spoliation of various ESI.¹⁷

On the other hand, another court decided to apply amended Rule 37(e) retroactively in a case that had been pending for two years, reasoning that because the amendment to Rule 37(e) is in some respects more lenient as to the sanctions that can be imposed for violation of the preservation obligation, there would be no inequity in applying it.¹⁸

In yet another case, the court retroactively applied the amended Rule 37(e) sanction standard after a prior ruling granting a sanction order under the pre-amendment Rule. Accordingly, the plaintiff was able to vacate an adverse inference ruling shortly before trial based on the new Rule’s restrictions on sanctions in the absence of a finding that the offending party intended to deprive its adversary of the use of the allegedly lost information.¹⁹

As recent cases illustrate, courts are applying each element of Rule 37(e) to determine whether, in the court’s ultimate discretion, spoliation sanctions are appropriate. This approach may lead to an increase in predictability and consistency in the area of spoliation sanctions as compared to application of the old Rule. Most significantly, courts are recognizing that an adverse inference for lost ESI under the amended Rule is now considered an “extreme remedy for the alleged spoliation of evidence.”²⁰ Such an extreme remedy now requires a showing of intent to deprive instead of mere negligence.

Contacts

For further information about the content of this paper, please contact:



Kim A. Leffert
kleffert@mayerbrown.com
312 701 8344



Alexandra L. Newman
anewman@mayerbrown.com
312 701 8263



Michael N. Morrill
mmorrill@mayerbrown.com
312 701 8231



Michael J.T. Downey
mdowney@mayerbrown.com
312 701 8585

Endnotes

1. Rand Institute for Civil Justice, where the money goes: understanding litigant expenditures for producing electronic discovery 17 (2012).
2. *Wai Feng Trading Co. v. Quick Fitting, Inc.*, 2016 U.S. Dist. LEXIS 77672 (D.R.I. June 14, 2016) (invoking the policies of the amended FRCP and discussing a number of rules including FRCP 1, 26(b), 26(f), and 34).
3. *See generally Douglas v. Kohl's Dep't Stores, Inc.*, 2016 U.S. Dist. LEXIS 54782 (M.D. Fla. Apr. 25, 2016) (weighing the proportionality factors listed in Rule 26(b)(1) and denying motion to compel discovery because the burden of searching the voluminous emails was disproportionate to what was needed in the case).
4. *See generally Lifeguard Licensing Corp. v. Kozak*, 2016 U.S. Dist. LEXIS 68724 (S.D.N.Y. May 23, 2016) (holding that amended Rule 26(b)(1) cannot be used for unpled claims or defenses).
5. The Sedona Conference WG1, *The Sedona Conference Commentary on Email Management: Guidelines for the Selection of Retention Policy*, 8 SEDONA CONF. J. 239, 239 (2007).
6. For example, in *Beard Research Inc. v. Kates*, 981 A.2d 1175, 1187 (Del. Ch. 2009), the court cautioned that “if the parties do not focus on the handling of e-discovery in the early stages of a case, the Court is not likely to be sympathetic when, for example, one party later complains that stringent measures were not instituted voluntarily by her adversary to ensure that no potentially relevant information was lost.” *I-Med Pharma Inc. v. Biomatrix, Inc.*, 2011 WL 6140658, at *1 (D.N.J. 2011) “highlights the dangers of carelessness and inattention in e-discovery.” Counsel for the plaintiff in that case failed to adequately educate themselves about their client’s data systems or the appropriate scope of search terms prior to their Rule 26(f) conference, resulting in their agreeing “to undertake an enormously expensive privilege review of material that [was] unlikely to contain non-duplicative evidence.” *Id.* at *6. While the court ultimately permitted the plaintiff’s counsel to avoid their previously agreed-to review, it chastised them for failing to “exercise[] more diligence before stipulating to such broad search terms, particularly given the scope of the search.” *Id.* at *5.
7. Indeed, proportionality first appeared in the FRCP in 1983. As recent opinions have observed, however, many courts were not consistently applying proportionality analyses prior to the recent rule change.
8. *E.g., Kaseberg v. Conaco, LLC*, No. 15CV01637JLS/DHB, 2016 WL 3997600, at *2 (S.D. Cal. July 26, 2016) (“The threshold requirement for discoverability under the Federal Rules of Civil Procedure is whether the information sought is ‘relevant to any party’s claim or defense and proportional to the needs of the case.’”); *Hahn v. Hunt*, No. CV 15-2867, 2016 WL 1587405, at *2 (E.D. La. Apr. 20, 2016) (identifying proportionality as a “threshold” concern).
9. *E.g., Kaseberg*, 2016 WL 3997600, at *10 (“As Plaintiff has not made a specific showing that the burdens of production would be minimal, proportional to the needs of the case, and that the requested documents would

lead to relevant evidence, the Court denies Plaintiff's motion to compel responses[.]"); *Sheets v. Villas*, No. 8:15-CV-1674-T-30JSS, 2016 WL 4001989, at *3 (M.D. Fla. July 26, 2016) ("Defendants have failed to file a response showing any relevance to the issues in dispute or explaining why the discovery sought is proportional to the needs of the case.").

10. *Mathew Enter., Inc. v. Chrysler Grp. LLC*, No. 13-cv-04236-BLF, 2016 WL 2957133 (N.D. Cal. May 23, 2016).
11. *Mathew Enter., Inc.*, 2016 WL 2957133, at *5.
12. *See, e.g., Orchestratehr, Inc. v. Trombetta*, 2016 WL 1555784 (N.D. Tex. Apr. 18, 2016) (holding that there is a high bar for imposing sanctions under Rule 37(e)); *FiTeq Inc. v. Venture Corp.*, 2016 WL 1701794 (N.D. Cal. Apr. 28, 2016) (litigants need to prove existence of missing data for FRCP 37(e) sanctions).
13. *FiTeq Inc.*, 2016 WL 1701794, at *3.
14. *E.g., Living Color Enter., Inc. v. New Era Aquaculture, Ltd.*, No. 14-CV-62216, 2016 WL 1105297, at *6 (S.D. Fla. Mar. 22, 2016).
15. *McIntosh v. United States*, No. 14-CV-7889 (KMK), 2016 WL 1274585, at *31 n.45 (S.D.N.Y. Mar. 31, 2016).
16. *Living Color Enter., Inc.*, 2016 WL 1105297, at *4.
17. *Thomas v. Butkiewicz*, No. 3:13-CV-747 (JCH), 2016 WL 1718368, at *8 (D. Conn. Apr. 29, 2016).
18. *Brown Jordan Int'l, Inc. v. Carmicle*, No. 0:14-CV-60629, 2016 WL 815827, at *36 (S.D. Fla. Mar. 2, 2016).
19. *Nuvasive, Inc. v. Madsen Med., Inc.*, No. 13CV2077 BTM(RBB), 2016 WL 305096, at *2 (S.D. Cal. Jan. 26, 2016).
20. *Accurso v. Infra-Red Servs., Inc.*, No. CV 13-7509, 2016 WL 930686, at *3 (E.D. Pa. Mar. 11, 2016).

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