



FEDERAL DISCOVERY RULES: WHAT'S CHANGING AND HOW LITIGANTS CAN TAKE ADVANTAGE RIGHT AWAY

by Mathea K. E. Bulander and Jason D. Moore

December 1, 2015 is expected to mark the arrival of new amendments to the Federal Rules of Civil Procedure.¹ These Amended Rules are the product of a long period of debate that began before 2010 regarding the abuse of discovery in American jurisprudence, particularly with regard to the discovery of electronically stored information (ESI).² The amendments are an extension of the eDiscovery principles that were incorporated into the Rules in 2006, and touch upon the timing of requests for production, the scope of discovery, proportionality, cooperation, meet-and-confer requirements, and spoliation sanctions. Organizations and counsel can benefit not only from studying the revised rules, but also by acting quickly to re-evaluate their discovery and information governance strategies with a focus on leveraging additional flexibility afforded by the new Rules.

Parties Can Start Thinking About Discovery Almost Right Away

Under Amended Rules 26 and 34, the timing for requests for production has changed. Per Amended Rule 26(d), parties can deliver an “early” Rule 34 request more than 21 days after serving the summons and complaint. Responses to early requests are not required until 30 days after the Rule 26(f) conference. As a practical matter, this may not change the ultimate timing of discovery. Receiving parties will, however, be able to contemplate requests, allow requests to inform their preservation efforts, and use them in preparation for Rule 26(f) conferences. Organizations and counsel should consider whether serving requests for production early in the litigation will help them efficiently determine the scope of relevant information and the potential sources of that information.

Notably, organizations will no longer be able to rely on boilerplate objections to discovery. Amended Rule 34 also explicitly directs the responding party to state specifically any objections to a request, to state whether any portion of an objectionable request is appropriate, and whether any responsive materials have been withheld.³ Organizations and counsel should be mindful that these requirements likely will require new and revised responses to familiar discovery and that failure to adhere to these requirements may result in waiver of the objection.⁴

¹ See Transmittal to Congress from Hon. John G. Roberts, Proposed Amendments to the Federal Rules of Civil Procedure, Apr. 29, 2015, available at http://www.supremecourt.gov/orders/courtorders/frcv15_5h25.pdf.

² See Judicial Conference Advisory Committee on the Federal Rules of Civil Procedure, 2010 Conference on Civil Litigation Website available at <http://www.uscourts.gov/RulesandPolicies/rules/archives/projects-rules-committees/2010-civil-litigation-conference.aspx> (last visited Nov. 3, 2015).

³ See Amended Rule 34(b)(2)(B) and 34(b)(2)(C).

⁴ See, e.g., *Marx v. Kelly, Hart & Hallman, P.C.*, 929 F.2d 8, 12 (1st Cir. 1991) (under Rule 34(b), “[i]f a party . . . fails to state the reason for an objection [to discovery], he may be held to have waived” it).

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Keep Your Eye on Case Management

Amended Rule 1 reflects an increased emphasis on case management and cooperation in discovery. Rule 1 as revised provides that *the parties* and the court are responsible for construing the Rules “to secure the just, speedy, and inexpensive determination of every action and proceeding.”⁵ In many ways, this amendment reflects the cooperation principles set forth by the Sedona Conference, the Seventh Circuit Electronic Discovery Pilot Project, and many local court rules. While the principle of cooperation may not be new, it is worth noting that it is expected to gain further traction with this added directive in Rule 1.

Reinforcing this overarching focus on cooperation, several common case-management strategies now will be codified in the rules:

- Scheduling Conferences: Under Amended Rule 16(b)(1)(B), scheduling conferences may no longer be held by mail, but may be held “in person, by phone, or by video conference.”
- Discovery Motions: Amended Rule 16(b)(3) codifies the court’s authority to order the parties to confer with the court before filing discovery motions.
- Discovery Plans: Under Amended Rule 26(f), discovery plans *must* state the parties’ positions on preservation of ESI, any agreed-to procedure for asserting privilege claims, and whether the parties request an order under Federal Rule of Evidence 502(d).
- Scheduling Orders: Amended Rule 16(B)(3) also provides that scheduling orders may address the preservation of ESI and 502(d) protections.

These changes reflect an increased emphasis within the Rules on effective, frequent, and cooperative discovery conferences—with an eye to proportionality and efficiency. Expect this to become standard practice.

Don’t Get Caught Off Guard in the Big Debate About the Scope of Discovery

Changes to Rule 26(b) are directed to the scope of discovery. Language regarding proportionality that was buried in subpart 26(b)(1)(C) will move to the main text of 26(b)(1) in the Amended Rule, such that fact discovery will be limited to information “relevant to any party’s claim or defense and proportional to the needs of the case.”⁶ As a result, proportionality will coexist with “the claims and defenses of the action” as a hallmark of relevance. While this may dramatically change the text of 26(b)(1), it is not clear that the effect of the revision will yield a revolution in discovery. There was much debate during the revision process about whether the proportionality principle already applies to the scope of relevance. Moreover, many of the 400-plus comments submitted to the Advisory Committee during the public-comment period on the revised rules expressed concern that Amended Rule 26 will shift to the requesting party the burden to establish that discovery requests are proportional. In light of this concern, the Advisory Committee expressly stated that “the parties and the court have a collective responsibility to consider the proportionality of all discovery.”⁷

It remains to be seen how courts will effectuate this change to the language of Rule 26. Litigants, however, should consider strategies for approaching proportionality under this new rubric. One suggested approach is to evaluate the proportionality of specific discovery requests or demands (rather than “discovery,” generally) in light of all the proportionality factors, not just one or two.⁸ This could help either a requesting or a receiving party to quickly identify “low-hanging fruit” that are likely to be deemed disproportionate. Similarly, organizations should

⁵ Amended Rule 1.

⁶ Amended Rules 30, 31, and 33 are also amended to reflect that leave to extend the discovery allowed under those rules must comport with the principles of proportionality articulated in Amended Rule 26(b)(1).

⁷ Advisory Committee Note to Federal Rules of Civil Procedure (“Committee Note”), *supra* note 2 at 19.

⁸ See Hon. Elizabeth D. Laporte and Jonathan M. Redgrave, *A Practical Guide to Achieving Proportionality Under New Federal Rule of Civil Procedure 26*, 9 FED. CT. L. REV. 20, 46 (2015).

be aware that if a discovery request is facially overbroad, a court may require the party to “make a showing of relevance and proportionality that is predicated on more than speculation or assumption.”⁹

A second change to Rule 26(b) may significantly alter the construction of the Rule with regard to relevance. Specifically, Amended Rule 26(b)(1) removes the familiar “reasonably calculated to lead to the discovery of admissible evidence”¹⁰ language and replaces it with a more direct articulation of the drafter’s intent: “Information within this scope of discovery need not be admissible in evidence to be discoverable.”¹¹ This change is inherently linked with the renewed focus on proportionality. It arose out of a concern that the “reasonably calculated” language has been used to improperly expand the scope of discovery beyond information that is relevant to the claims and defenses in an action. The Advisory Committee Note clarifies that such a construction of the rule is contrary to the intent of the drafters.¹²

In practice, this change may not affect initial requests for discovery, but is likely to be cited in objections to irrelevant and overbroad discovery and may also be hotly disputed in motion practice. It will take time for the case law to evolve, and initial opinions will be only moderately helpful given that discovery disputes are inherently fact specific.

A Unified Standard for Spoliation and True Safe Harbor for Unintentional Loss of ESI

Amended Rule 37(e), which concerns spoliation of ESI,¹³ expands and builds upon the safe harbor found in the current Rule. The Rule will permit courts to order “curative measures” where: (1) ESI which should have been preserved is lost (2) because of a failure to take reasonable, proportional steps to preserve ESI, (3) if the ESI cannot be replaced or restored through additional discovery, and (4) the loss results in prejudice. Severe sanctions like adverse-inference jury instructions are reserved for cases where the loss results from conduct intended to deprive another party of the ESI’s use.¹⁴

Amended Rule 37(e) is intended to provide litigants with a uniform national standard by which to make preservation decisions. Until now, courts have largely predicated their authority to award spoliation sanctions on their own “inherent authority” to supervise cases. The Committee Note makes clear that Rule 37(e) is intended to be the exclusive authority for such sanctions and that courts no longer may rely on their inherent authority to sanction a party for spoliation of ESI.¹⁵ The Rule provides a single standard applicable in all federal courts, and abrogates strict standards in some circuits that have led to severe consequences for some litigants who have lost ESI through mere negligence (and, consequently, motivated many litigants to expend tremendous resources to attempt to achieve “perfect” preservation).¹⁶

The rule’s analytic framework begins with whether the information lost “should have been preserved in the anticipation or conduct of litigation,” which will continue to be governed by the common-law standard.¹⁷ Unlike current standards, Rule 37(e) only applies if lost ESI “cannot be restored or replaced through additional discovery.” Courts are likely to wrestle with what the distinction between “restored” and “replaced” means.

⁹ Hon. Craig B. Shaffer, *The “Burdens” of Applying Proportionality*, 16 SEDONA CONF. J. ___ (forthcoming 2015).

¹⁰ Committee Note at 24.

¹¹ Amended Rule 26(b)(1).

¹² Committee Note at 24.

¹³ Amended Rule 37(e) expressly only applies to “electronically stored information that should have been preserved in the anticipation or conduct of litigation.”

¹⁴ Amended Rule 37(e).

¹⁵ Committee Note at 38.

¹⁶ *Compare Mann v. Taser Int’l, Inc.*, 588 F.3d 1291, 1310 (11th Cir. 2009) (adverse inference can be “drawn from a party’s failure to preserve evidence only when the absence of that evidence is predicated on bad faith”) and *Res. Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 107 (2d Cir. 2002) (“culpable state of mind” sufficient to support adverse inference may be evinced “by a showing that the evidence was destroyed ... negligently.”).

¹⁷ Committee Note at 39 (“potential litigants have a duty to preserve relevant information when litigation is reasonably foreseeable.”).

The Committee Note suggests that courts should consider, if appropriate, ordering discovery from sources that ordinarily might be considered “inaccessible” under Rule 26(b)(2)(B), such as disaster-recovery backup tapes—a process often described as “restoring” archived data.¹⁸ It will be important to watch how far courts will let litigants go to “replace” lost ESI in the interest of avoiding “curative measures,” but counsel should feel empowered to offer creative solutions.¹⁹

Litigants should be prepared to demonstrate that they took reasonable, proportional steps to preserve information in a given case, such as by having a litigation-hold policy and documenting that the policy was followed. An order of curative measures only will issue if the information has been lost “because a party failed to take reasonable steps to preserve it.” “[P]erfection in preserving all relevant [ESI] is often impossible. ... This rule ... does not call for perfection.”²⁰ Importantly, the Committee Note admonishes courts to be cognizant that preservation efforts should be proportional to the needs of the case.²¹ Reasonableness does not require parties to adopt the most effective, most burdensome, or even “best” preservation practices; even “a less costly form of information preservation, if it is substantially as effective as more costly forms,” may be reasonable.²²

Once a court has established that relevant information was lost through failure to take reasonable preservation steps, it must consider whether the loss has resulted in “prejudice to another party.”²³ The Amended Rule does not establish, however, which party will bear the burden of proving prejudice. Instead, it gives courts latitude to “determine how best to assess prejudice in particular cases.”²⁴ Existing case law typically requires a party moving for sanctions to show that the destruction of evidence has caused prejudice but under the amended Rule a court could order the spoliating party to show why a loss of apparently relevant ESI is *not* prejudicial to its opponent.

If prejudice is found, the court is tasked with selecting measures “no greater than necessary to cure,” rather than punish, the prejudice, “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 [short of an adverse inference] to assist in its evaluation of such evidence or argument.”²⁵ Rule 37(e)(2) as revised reserves adverse inference instructions, dismissal of claims, or entry of default judgment as sanctions for spoliation only if the court finds “that the party acted with the intent to deprive another party of the information’s use in the litigation.”

Thus, Amended Rule 37(e)(2) abrogates those precedents that permit issuance of an adverse inference jury instruction where spoliation results from negligence or even gross negligence.²⁶

The 2015 Amendments to the Federal Rules are the culmination of years of effort and thought about how to achieve the longstanding goals of making the discovery process truly “just, speedy and inexpensive.” Parties can immediately take advantage of the opportunities afforded by the Amended Rules to embrace collaboration, press for proportional, reasonable limits on discovery and preservation, and as a result, drive down the costs of making business information available for use in litigation.

¹⁸ *Id.* at 42.

¹⁹ *Id.* at 42 (“If the information is restored or replaced, no further measures should be taken.”).

²⁰ *Id.* at 41 (“the rule . . . is inapplicable when the loss of data occurs despite the party’s reasonable steps to preserve it”); Rule 37(e) thus rejects so-called “per se” negligence standards such as that espoused in *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 220 (S.D.N.Y. 2003) (“Once the duty to preserve attaches, any destruction of documents is, at a minimum, negligent.”).

²¹ *Id.* (one “factor in evaluating the reasonableness of preservation efforts is proportionality.”)

²² *Id.*

²³ *Id.* at 43 (“a court may resort to (e)(1) measures only upon finding prejudice to another party from loss of the information”).

²⁴ *Ibid.*

²⁵ *Id.* at 44.

²⁶ See, e.g., *Res. Funding Corp.*, 306 F.3d at 107; Committee Note at 45.