Legal Backgrounder

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At One-Year Anniversary, Cautious Optimism as New E-Discovery Rules Gain Some Traction

by John J. Jablonski

The new "E-Discovery" amendments to the Federal Rules of Civil Procedure had been in effect one year as of December 1, 2016.[1] While old judicial habits die hard, some recent decisions suggest reason for cautious optimism.

The new Rules resulted in two significant changes.[2] First, the scope of discovery has been narrowed by an amendment to Rule 26(b)(1). This is no minor tweak. It is designed to significantly reduce discovery costs and focus the parties on the merits of a case. Second, a new Rule 37(e) expressly swept away inconsistent federal spoliation decisions involving the failure to preserve electronically stored information (ESI). Creation of a rules-based spoliation standard also marks a major shift. The new framework of Rule 37(e) replaces spoliation caselaw that relied on courts' inherent powers to sanction parties for lost or destroyed ESI. A significant addition to Rule 37(e) prohibits sanctions when ESI is lost despite the use of reasonable steps during preservation.

As this Legal Backgrounder will explain, some courts are starting to apply the express intent and language of the new Rules adeptly.

Narrower "Scope of Discovery" Explained

New Rule 26(b)(1) limits discovery to matters that are "relevant to any party's claim or defense." Gone is the premise that any discovery is allowed so long as it is "reasonably calculated to lead to the discovery of admissible evidence." This change limits the proper focus of discovery on the claims and defenses in the litigation.[3] Some judges are now working to explain this distinction to their colleagues and litigants in opinions carefully applying the new Rule.

As a May 2016 WLF Legal Backgrounder explained, courts risk inadvertently evading the new, narrower scope of discovery by ignoring this change.[4] The former Chair of the Advisory Committee on Federal Rules that drafted new Rule 26(b)(1), Federal District Court Judge David G. Campbell, wrote in an opinion that "[o]ld habits die hard" while citing to seven cases "last month alone" that relied on deleted language to define the scope of discovery.[5] To drive home the importance of the change, Judge Campbell cited the Rules Enabling Act, explaining how the 2015 amendment abrogated cases applying prior versions of Rule 26(b)(1).[6] The test for relevancy is whether evidence is "relevant to any party's claim or defense," not whether it is "reasonably calculated to lead to admissible evidence."[7]

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Getting Closer Despite *Oppenheimer*

Another effort to set the record straight is *Cole's Wexford Hotel, Inc. v. Highmark Inc*.[8] The opinion tracks Rule 26 from its inception in 1937 through all subsequent amendments (an exhaustive list of changes) to new Rule 26(b)(1). The court traces this long path to hold: "[I]t would be inappropriate to continue to cite to *Oppenheimer* for the purpose of construing the scope of discovery under amended Rule 26(b)(1)."[9] The court ultimately rejected the magistrate judge's broad recommended scope of discovery, because "the scope of discovery is limited to matter that is relevant to claims or defenses and is proportional to the needs of a case."[10]

Some courts have opted for an easier path, simply deleting the offending "reasonably calculated" language criticized in *Cole's Wexford Hotel*, yet quoting the 40-year-old analysis set forth by the US Supreme Court in *Oppenheimer Fund, Inc. v. Sanders*[11] to improperly describe a very broad scope of discovery.[12] While this approach may seem better, as pointed out in *Cole's Wexford Hotel*, reliance on *Oppenheimer* to define the scope of discovery is misplaced.

Courts Starting to Apply Proportionality Requirements

The new scope of discovery permits discovery of any nonprivileged matter that is both relevant and proportional to the needs of a case.[13] The "proportionality" factors are now directly in Rule 26(b)(1). In *First Niagara Risk Management v. Folino*, the court listed the factors from the Rule (adding numbers to help): "(1) the importance of the issues at stake, (2) the amount in controversy, (3) the parties' relative access to information, (4) the parties' resources, (5) the importance of discovery in resolving the issues, and (6) whether the burden or expense of discovery outweighs its likely benefits."[14] Following an analysis of each factor, the court permitted expansive, but proportional, discovery in a business dispute.

Following an analysis of some of the proportionality factors, the *In Re Baird* court held that wide ranging discovery of communications with foreign regulators was too burdensome and therefore not proportional in light of extensive discovery already conducted involving communications with US regulators.[15] The court in *FTC v. DIRECTV* relied on the spirit of proportionality rather than a six-factor analysis to limit discovery against the Federal Trade Commission (limiting ESI production to sampling rather than full-scale production). The court held that the parties and the court have a collective responsibility to consider the factors bearing on proportionality before propounding discovery requests, issuing responses and objections, or raising discovery disputes before the courts.[16]

The first federal court of appeals to cite proportionality under new Rule 26(b)(1) did so in the context of reversing the denial of a motion to amend a complaint. In *United States ex rel. Customs Fraud Investigations, LLC v. Victaulic Co.* the US Court of Appeals for the Third Circuit cited to proportionality as guidance for avoiding excessive expense and difficulty during potentially complex discovery.[17] Quoting Chief Justice Roberts's *2015 Year-End Report on the Federal Judiciary*, the court said "the key here is careful and realistic assessment of actual need."[18]

Restructured Rule 37(e) Gains Ground

New Rule 37(e) was honored in the breach at the start of 2016.[19] In the second half of the year, courts began to embrace the step-by-step analysis required by the new Rule. Some courts developed a detailed analytical framework to determine if Rule 37(e)(1) or (2) applies and whether sanctions are warranted. In *Richard v. Inland Dredging*, the court analyzed four predicate elements before considering sanctions: "(a) the

existence of ESI of a type that should have been preserved; (b) ESI is lost; (c) the loss results from a party's failure to take reasonable steps to preserve it; and (d) it cannot be restored or replaced through additional discovery."[20] The court held that inaccuracies regarding evidence were cured and not made with an intent to deprive. In another example, *Staller v. QVC*, plaintiff failed to establish some ESI was lost, so sanctions could not be considered.[21]

Failure to prove prejudice once the four elements have been established also prevents sanctions. In *Taylor v. Ethicon*, lost ESI was mostly replaced and did not result in a finding of prejudice by the court.[22]

A stark example is *GE Netcom v. Plantronics.*[23] The court directly analyzed whether "reasonable steps" were taken to preserve relevant evidence. The court held that Plantronics did not take reasonable steps, despite issuing multiple litigation holds, conducting training regarding litigation holds, and responding promptly once Plantronics learned a key employee deleted thousands of emails.[24] Key preservation failures included the head of sales asking others to delete emails, the timing of the requests in relation to discovery demands, and defendant's failure to take reasonable steps to restore deleted ESI once discovered. The deleted emails were central to the case, causing prejudice that could not be cured by lesser measures. The court awarded a monetary sanction of $3,000,000, but felt this did not cure defendant's misconduct. Applying 37(e)(2), the court held defendant acted with "the intent to deprive" plaintiff of the use of the emails in the litigation and awarded an adverse inference charge. Defendant's litigation tactics of obfuscating the deletion of emails was relied upon, in part, to establish defendant's intent.

Litigation tactics were also held to support the requisite "intent to deprive" necessary to allow the harshest sanction pursuant to 37(e)(2)(C) in *Global Material Technologies v. Dazheng Metal Fibre*.[25] The court granted a default judgment because, among other preservation failures, defendants played games during a Rule 30(b)(6) deposition and told "lies" during representations to the court about connections to a third-party entity.

Renewed Emphasis on Trigger Events

Rule 37(e) does not apply when there is no duty to preserve, and there can be no sanctions for a failure to preserve. As a result, the date the duty to preserve is triggered is being emphasized. For example, in *First American Title Insurance v. Northwest Title Insurance*, the court held that the contentious establishment of a competing company by former employees was insufficient to trigger the duty to preserve.[26] In *Terral v. Ducote*, an altercation, without a corresponding grievance by a prisoner, was insufficient to trigger the duty to preserve.[27]

Conclusion

Decisions from the second half of 2016 reflect that some judges are using the new Rules as intended. A few judges are doing their best to demonstrate proper methods of analysis and to dissuade their colleagues from citing to caselaw rendered inapplicable by the new Rules. While these efforts are giving the new Rules some traction, practitioners must remain diligent in reminding their presiding trial court judges that new Rules are in effect, and parties that are on the losing side of courts' reliance on old discovery principles will need to appeal those defeats to federal courts of appeals.

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(Endnotes)

[1] FED. R. CIV. P. 26(b)(1) and 37(e).
[2] Chief Justice John Roberts, *2015 Year-End Report on the Federal Judiciary*, available http://www.supremecourt. gov/publicinfo/year-end/2015year-endreport.pdf.
[3] FED. R. CIV. P. 26(b)(1), Committee Note ("The 'reasonably calculated' phrase has continued to create problems, however, and is removed by these amendments. It is replaced by the direct statement that 'Information within this scope of discovery need not be admissible in evidence to be discoverable.' Discovery of nonprivileged information not admissible in evidence remains available so long as it is otherwise within the scope of discovery.")
[4] John J. Jablonski, *Despite Advent of New E-Discovery Rules, Old Judicial Habits Still Infect Federal Decisions,* Washington Legal Foundation LEGAL BACKGROUNDER, Vol. 31, No. 15 (May 25, 2016).
[5] *In Re: Baird IVC Filters Products Liability Litigation*, 2016 U.S. Dist. LEXIS 126448, at *122-123, n.1 (D. Ariz. Sept. 16, 2016) (Campbell, J.) (collecting cases).
[6] *Id*. at *123.
[7] *Ibid*.
[8] *Cole's Wexford Hotel, Inc. v. Highmark Inc.*, 2016 U.S. Dist. LEXIS 127793, at *16-34 (W.D. Pa. Sept. 20, 2016).
[9] *Id*. at *34.
[10] *Ibid*.
[11] 437 U.S. 340 (1978).
[12] *Mortgage Resolution Servicing, LLC v. JPMorgan Chase Bank, N.A.*, 2016 U.S. Dist. LEXIS 91570, at *9 (S.D.N.Y. July 14, 2016), quoting *Oppenheimer Fund, Inc.*, 437 U.S. at 351 and *Scribner v. Ocean State Jobbers, Inc.*, 2016 U.S. Dist. LEXIS 124645 (D. Conn. Sept. 14, 2016).
[13] FED. R. CIV. P. 26(b)(1).
[14] 2016 U.S. Dist. LEXIS 106094, at *11 (E.D. Pa. Aug. 11, 2016).
[15] 2016 U.S. Dist. LEXIS 126448, at *130.
[16] *FTC v. DIRECTV, Inc.*, 2016 U.S. Dist. LEXIS 75480 (N.D. Cal. June 9, 2016).
[17] 839 F.3d 242 (3d Cir. 2016).
[18] *Ibid*.
[19] Jablonski, *supra* note 4 at 4 (reporting "some courts are ignoring the clear language of the new rule and are employing 'inherent authority' to impose sanctions for conduct that is clearly governed by new Rule 37(e)….").
[20] 2016 U.S. Dist. LEXIS 134859, at *9-10 (W.D. La. Sept. 29, 2016); *see also Konica Minolta Bus. Solutions, U.S.A., Inc. v. Lowery Corp.*, 2016 U.S. Dist. LEXIS 117120 (E.D. Mich. Aug. 31, 2016) (although four predicate elements were established, more discovery was necessary to determine if reasonable steps had been taken to preserve).
[21] 2016 U.S. Dist. LEXIS 99236, at *13-14 (E.D. Pa. July 29, 2016).
[22] 2016 U.S. Dist. LEXIS 138884 (S.D. W.Va. Oct. 6, 2016).
[23] 2016 U.S. Dist. LEXIS 93299 (D. Del. July 12, 2016).
[24] *Id*. at *20-24.
[25] 2016 U.S. Dist. LEXIS 123780, at *34-36 (N.D. Ill. Sept. 13, 2016).
[26] 2016 U.S. Dist. LEXIS 118377, at *7 (D. Utah Aug. 31, 2016).
[27] 2016 U.S. Dist. LEXIS 127498 (W.D. La. Sept. 19, 2016).

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