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Amended Rules of Civil Procedure Address eDiscovery Preservation and Sanctions, Among Other Areas

Bloomberg BNA recently conducted this interview with Paul Weiner, shareholder and National eDiscovery Counsel at Littler Mendelson, P.C., about the proposed changes to the Federal Rules of Civil Procedure, specifically those affecting e-discovery.

Bloomberg BNA: In September, the Judicial Conference of the United States approved changes to the Federal Rules of Civil Procedure, particularly those affecting discovery, which will go to the Supreme Court for adoption and could take effect Dec. 1, 2015. Can you tell us briefly what these changes are as they relate to eDiscovery?

Paul Weiner: Initially, it is important to note that the proposed amendments to the Rules represent a multi-year effort by the Advisory Committee on Federal Rules of Civil Procedure of the Judicial Conference of the United States that started in 2010. After holding several conferences to develop rules proposals, a package of proposed amendments was released for public comment in August 2013. In response, the Advisory Committee received over 2,300 written comments. The Advisory Committee also held three public hearings in Washington, D.C., Phoenix, Arizona and Dallas, Texas, during which over 120 witnesses testified about the proposed amendments. After the close of the public comment period, the proposed amendments were further revised. In April 2014, after additional changes were made to the proposed amendments, the Advisory Committee ultimately adopted and approved its final version of proposed amendments. In May 2014, the Standing Committee on Rules of Practice and Procedure, and in September 2014, the Judicial Conference of the United States, respectively, approved the proposed amendments. They have now been forwarded to the U.S. Supreme Court and Congress, who will review them in 2015, and if the Court or Congress do not take action, the amendments will become effective on December 1, 2015.

With that background, the four biggest changes in terms of eDiscovery are:

- First: the ''proportionality'' factors currently contained in Rule 26(b)(2)(C)(iii) have been moved up into the definition of the scope of discovery in Rule 26(b)(1), to clarify that proportionality is a fundamental consideration in all aspects of modern litigation.
- Second: Rule 26(c)(1)(B) has been amended to provide ''the allocation of expenses'' as an item that can specifically be requested and included in a protective order. While case law provides that courts have the authority to allocate discovery expenses, this amendment makes such authority explicit on the face of the rule, and according to the

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Committee Note was included to ''forestall the temptation some parties feel to contest this authority.''

- Third: The ''reasonably calculated to lead to the discovery of admissible evidence'' language in Rule 26(b)(1) has been deleted to correct a common misconception and make clear that this language was never designed to define the scope of discovery.
- Finally: Proposed Rule 37(e) provides a new paradigm for awarding sanctions—or ''curative measures''—for the loss of relevant ESI (electronically stored information). Not only does it provide a uniform, national framework, but it also raises the bar for when severe measures—like adverse inference instructions—can be ordered in a case based upon the loss of ESI, and also sets forth certain threshold factors that must be met before less severe ''curative measure'' can be ordered for the loss of ESI.

The Advisory Committee also set the tone for interpreting all of the amendments with a small but telling change to Rule 1, which now provides that the Civil Rules ''should be construed, administered, *and employed by the court and the parties* to secure the just, speedy, and inexpensive determination of every action and proceeding.'' As the Advisory Committee Note explains, this amendment addresses ''pleas to improve the administration of civil justice by discouraging the overuse, misuse and abuse of procedural tools that increase cost and result in delay.'' As amended, Rule 1 emphasizes that parties and their lawyers share in this responsibility.

BBNA: A press release from the Judicial Conference said the rule changes will encourage the ''proportional use of discovery based on the needs of the case.'' Specifically, the proposal amends Rule 26(b), moving the proportionality factors included in present Rule 26(b)(2)(C)(iii) to become part of the scope of discovery in Rule 26(b)(1). How will the placement of this proportionality question affect the scope of discovery, particularly eDiscovery?

Weiner: The proportionality factors have been part of the federal rules for over 30 years: they were originally added to Rule 26(b)(1) in 1983; they were moved to Rule 26(b)(2)(C) in 1993; and they were referenced in amendments to Rule 26(b)(1) in 2000.

Yet, there was a strong consensus during the public comment process leading up to the proposed rule amendments that the proportionality factors currently located in Rule 26(b)(2)(C)(iii) were often overlooked by litigants, or just as frequently not applied by courts. Moreover, multiple surveys that were submitted to the Rules Committee by diverse organizations (including the ABA Section of Litigation, the National Employment Lawyers Association, the Institute for Advancement of the American Legal System, and the American College of Trial Lawyers) uniformly found that parties believe that discovery costs are disproportionately high in small and large cases alike, and in some instances high discovery costs were being used as a weapon to force the settlement of cases versus adjudicating them on the merits.

Simply stated, moving the proportionality factors to Rule 26(b)(1) where the scope of discovery is defined will help achieve Rule 1's objective of the ''just, speedy, and inexpensive determination of every action.'' Proposed Rule 26(b)(1) now mandates that discovery must be ''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.''

With respect to eDiscovery specifically, the Committee Note to proposed Rule 26 specifically recognizes that eDiscovery can take over cases in today's digital age, and underscores that because of the continued proliferation of data there will often be a need for active case management by judges to enforce the proportionality mandates of the rule, stating, ''Restoring proportionality as an express component of the scope of discovery warrants [noting that] . . . the rule contemplates greater judicial involvement in the discovery process and thus acknowledges the reality that it cannot always operate on a self-regulating basis. . . . The information explosion of recent decades has greatly increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument for delay or oppression. What seemed an explosion in 1993 has been exacerbated by the advent of eDiscovery. The present amendment again reflects the need for continuing and close judicial involvement in the cases that do not yield readily to the ideal of effective party management . . . [and] there will be important occasions for judicial management both when parties are legitimately unable to resolve important differences and when the parties fall short on effective, cooperative management on their own.''

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It is also important to note that proposed Rule 37(e) that addresses ''curative measures'' (versus sanctions) for the loss of ESI, applies only to electronically stored information. When submitting its report to the Standing Committee that contained the proposed amendments, the Advisory Committee noted that the ''new and unprecedented challenges'' presented by the explosion of ESI in civil litigation was the primary factor motivating an amendment to Rule 37(e).

BBNA: How are scope of discovery battles under Rule 26(b)(1) likely to play out under the amended provision?

Weiner: From a practical perspective, it is important to quickly establish the scope of the case for purposes of applying the proportionality mandates, and there are many ways to do this.

For example, a party can push its adversary for early and complete Rule 26(a)(1)(A) disclosures, that mandate a party must provide ''a computation of each cat-

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egory of damages'' without awaiting a discovery request. The scope of the case can also be established by basic interrogatories, through deposition testimony or through a request that a settlement demand be provided in advance of early case conferences given the court's authority to consider ''settling the case and using special procedures to assist in resolving the dispute'' at a Rule 16 conference.

The Committee Note to Rule 26 also states: ''A party claiming undue burden or expense ordinarily has far better information—perhaps the only information—with respect to [the burden or expense of responding] part of the determination.'' Thus, once the scope of the case is delineated, when framing proportionality arguments it is helpful to provide objective information about the costs and burdens involved for particular discovery tasks. This can be provided as part of informal meet-and-confer discussions or letters, or through more formal means.

The Committee Note, however, also emphasizes that when applying a proportionality analysis a requesting party has a burden to meet as well, stating: ''A party claiming that a request is important to resolve the issues should be able to explain the ways in which the underlying information bears on the issues [in the case].'' Thus, when framing a proportionality dispute, it is helpful to push the requesting party to precisely delineate why the ESI they are requesting is important to the merits of the case. On this issue, the Committee Note also tacitly acknowledges the comments it received about eDiscovery sometimes being used as a weapon to run up the costs of a case to force a party to settle, stating, ''[T]he court must apply the [proportionality] standards in an even-handed manner that will prevent use of discovery to wage a war of attrition or as a device to coerce a party, whether financially weak or affluent.''

Litigants should also not lose sight of the marginal utility factor set forth in the proportionality mandates of proposed Rule 26(b)(1): whether the burden or expense of the proposed discovery outweighs its likely benefit. As an example, in nationwide Fair Labor Standards Act cases, where the amount in controversy can be tens of millions of dollars, there are still opportunities to raise proportionality arguments. If in a retail situation, the company often uses store-level security videos for safety and loss prevention incidents, which are only maintained for short periods of time. While it is possible that those security videos may capture some information that is tangentially relevant to the parties' claims or defenses in the case, to capture such videos on a long-term basis for review and production in discovery usually involves installing additional hardware that can costs tens of millions of dollars. In such a situation, the substantial burdens and costs for preserving this data may outweigh the marginal utility of the few instances where it may capture potentially relevant information. Furthermore, if the adversary feels strongly that incurring such a significant expense to possibly recover slivers of potentially relevant information is nevertheless worthwhile, the amended rule now expressly provides that protective orders can allocate expenses for discovery. Thus, if they want such disproportionate discovery, pursuant to the amended rule, they would have to pay for it.

[T]he time is ripe for the proposed rules, and my hope is that around this time next year they will have been enacted and we will be talking about how courts are beginning to apply them.

BBNA: What is the significance of removing the ''reasonably calculated to lead to the discovery of admissible evidence'' language in Rule 26(b)(1)?

Weiner: It seems like every day I hear lawyers argue that they are entitled to something in discovery because it is ''reasonably calculated to lead to the discovery of admissible evidence.'' Simply put, this is a misstatement of the applicable standard for the scope of discovery.

Indeed, in its report to the Standing Committee that explained the proposed amendments, the Advisory Committee noted that the phrase ''reasonably calculated'' was never intended to define the scope of discovery. Rather, that language was added to the rules in 1946 because parties in depositions were objecting to relevant questions on the ground that the answers would not be admissible at trial, thus, objections on inadmissibility were being used to bar relevant discovery.

Because of this, the Advisory Committee also noted the common argument that ''any inquiry that is 'reasonably calculated' to lead to something helpful in the litigation is fair game in discovery'' is fundamentally incorrect and that such an interpretation could ''swallow any other limitation on the scope of discovery.''

Thus, this phrase has been removed from Rule 26 and is replaced by language clarifying that information within this scope of discovery need not be admissible in evidence to be discoverable, or as the Committee Note explains: ''Discovery of nonprivileged information not admissible in evidence remains available so long as it is otherwise within the scope of discovery.''

In short, removing this language should focus the scope of discovery in civil litigation.

BBNA: The Judicial Conference's press release said that the amendments also ''clarif[y] the remedies available for the loss of electronically stored information,'' which are in proposed changes to Rule 37(e). Can you summarize this change?

Weiner: Proposed Rule 37(e) is a sea change. Significant comments and testimony were provided to the Advisory Committee about:

- The split among circuits regarding when it is appropriate to award serious sanctions like adverse inference instructions, with some circuits imposing them for the negligent loss of ESI while others required a showing of bad faith;
- Large companies with national footprints spending hundreds of millions of dollars to overpreserve ESI out of fear that their actions might in hindsight be viewed as negligent and result in serious—indeed, case ending—sanctions if they were sued in a circuit that permits adverse inference instructions on the basis of negligence; and

- The staggering volumes of ESI that will only continue to grow. One industry expert reported to the Advisory Committee that there will be over 26 billion devices that can access the Internet in six years—more than three for every person on earth.

Furthermore, during a recent ''Perspectives from the Rule-Makers on Proposed FRCP Amendments'' panel at the Georgetown Advanced eDiscovery Institute, Judges David Campbell, the Chair of the Civil Rules Advisory Committee, John Koeltl, the Chair of the ''Duke'' Subcommittee that spearheaded the drafting of proposed Rule 26, and Paul Grimm, the Chair of the Discovery Subcommittee that spearheaded the drafting of proposed Rule 37, noted that while litigants often think about ''sanctions'' as ''sticks'' to incentivize litigants to do the right thing, the Advisory Committee wanted to craft a rule that focused instead on ''carrots'' to encourage proper behavior.

Indeed, while the public comment version of Rule 37(e) had the term ''sanctions'' in the heading, the proposed rule that was ultimately adopted and approved does not even use the word ''sanctions.'' Instead, it provides specific ''curative measures'' that a court can take ''if ESI 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.''

Thus, as an initial matter, and consistent with the ''carrot'' approach to incentivize good behavior, the rule is inapplicable when the loss of information occurs if a party took reasonable steps to preserve it. The Committee Note underscores this point stating: ''[Rule 37(e)] is inapplicable when the loss of information occurs despite the party's reasonable steps to preserve it. . . . The rule only applies if the information was lost because the party failed to take reasonable steps to preserve the information.'' On this point, to further underscore Rule 26's focus on proportionality, the Committee Note to Rule 37 expressly notes that a key factor in evaluating the reasonableness of preservation efforts is proportionality, because ''aggressive preservation efforts can be extremely costly.''

Again consistent with the ''carrot'' philosophy, the Committee Note also makes clear that '' 'reasonable steps' to preserve suffice; [the rule] does not call for perfection.''

Likewise, even if information is lost, the initial focus under the proposed rule should be on whether the lost information can be restored or replaced through additional discovery. If it can, that is the end of the inquiry—period. As the Committee Note explains, ''[b]ecause electronically stored information often exists in multiple locations, loss from one source may often be harmless when substitute information can be found elsewhere.'' On this point, the Committee Note again underscores the Advisory Committee's and Rule 26's focus on proportionality, noting that efforts to replace or restore lost information through discovery should also be bounded by proportionality, stating: ''[S]ubstantial measures should not be employed to restore or replace information that is marginally relevant or duplicative.''

If—and only if—all of those threshold requirements are met, may a court then proceed to consider the specific steps it can take to address the loss of ESI. Here, the proposed rule provides that a court may:

- Upon a finding of prejudice to another party, order ''measures no greater than necessary to cure the prejudice.'' Thus, under this provision, if there is no prejudice, the inquiry is over. Furthermore, if the information is restored or replaced, no further measures should be taken.

- Only upon a finding ''that the party acted with intent to deprive another party of the information's use in litigation,'' may a court use the ''very severe'' measures of ordering an adverse inference instruction that presumes the lost information was unfavorable to the party or enter a default judgment/dismiss the action. However, even here, the Committee Note instructs that courts should exercise restraint, stating: ''Courts should exercise caution, however, in using the measures specified [in this section]. . . . The remedy should fit the wrong, and the severe measures authorized by this subdivision should not be used when the information lost was relatively unimportant or lesser measures such as those specified in [the prior section] would be sufficient to redress the loss.''

BBNA: Will the rule change inform federal courts or help resolve a circuit split on whether loss of ESI requires bad faith to warrant sanctions?

Weiner: Absolutely. Proposed Rule 37(e) creates a uniform, national standard and rejects prior cases that allowed severe sanctions based upon negligent conduct.

In particular, one of the consistent concerns expressed to the Advisory Committee during the public comment period was that litigants were subjected to an inconsistent patchwork of different standards for sanctions based upon the loss of ESI that could vary by Circuit, District and even by Judges within a District.

In the Advisory Committee's report to the Standing Committee that explained the proposed amendments, the Advisory Committee also highlighted:

- In a world where ESI is more easily lost than tangible evidence, an adverse inference sanction imposes a heavy penalty for losses that are likely to become increasingly frequent as ESI multiplies.

- Permitting an adverse inference for negligence creates powerful incentives to over-preserve, often at great cost.

- The ubiquitous nature of ESI and the fact that it often may be found in many locations presents less risk of severe prejudice from negligent loss than may be present due to the loss of tangible things or hard-copy documents.

Moreover, the Advisory Committee ultimately abandoned a prior proposed version of Rule 37(e) that required ''willful or bad faith'' conduct before sanctions could issue, based upon public comments that some courts have held that the term ''willful'' can encompass negligent or grossly negligent conduct.

Accordingly, the section of proposed Rule 37(e) that authorizes courts to order severe measures like an adverse inference instruction specifically requires a finding that the party that lost the information ''acted with the intent to deprive another party of the information's use in the litigation.'' This is a very high standard of culpability. To avoid any confusion about this uniform standard and whether negligence plays any role under the proposed Rule, the Committee Note states, ''[The rule] is designed to provide a uniform standard in federal court for use of these serious measures when addressing failure to preserve electronically stored infor-

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mation. It 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. Adverse-inference instructions were developed on the premise that a party's intentional loss or destruction of evidence to prevent its use in litigation gives rise to a reasonable inference that the evidence was unfavorable to the party responsible for loss or destruction of the evidence. Negligent or even grossly negligent behavior does not logically support that inference.''

Finally, to ensure that courts do not rely upon their inherent authority to sidestep Rule 37(e)'s mandates (including by re-injecting a negligence standard into a sanctions/curative measures analysis), the Committee Note expressly states that proposed Rule 37(e) ''forecloses reliance on inherent authority or state law to determine when certain measures should be used.''

BBNA: Will the change to Rule 37(e) significantly help with the over-preservation problem for organizations?

I believe so. The proposed rule provides a uniform, objective framework that rewards litigants who take reasonable steps to preserve information, makes clear that perfection is not the standard, focuses on replacing data—versus sanctions—if data is lost, takes negligence out of the equation by limiting the most severe sanctions to those cases where a party had the specific intent to deprive its adversary of its use in the litigation, and overlays proportionality over all aspects of preservation and discovery. Coupled with other rule amendments that focus on early judicial involvement in cases and the ability to allocate costs, including to address preservation issues before they take over cases, there are many tools for litigants to work with to reduce preservation burdens.

BBNA: If the new rules are adopted, should companies alter their data retention/electronic information policies?

The short answer is that pre-litigation data retention and electronic information policies are not impacted by the rules.

As a general matter, outside of the litigation context, if there is no federal, state, local or industry regulation that requires the retention of data, or business reason to keep data, it is generally a good idea to get rid of it.

However, once the duty to preserve is triggered, a different set of obligations apply, and that is when the protections of the new rule framework apply and litigants can take advantage of the tools we just discussed that are available to reduce preservation burdens.

BBNA: Will the rule amendments help companies, which are constantly evaluating litigation possibilities, make decisions about when litigation is ''reasonably anticipated''?

They do not. A very early proposal of Rule 26 and 37 contained a framework that attempted to delineate the trigger, scope and duration of preservation obligations. That framework was abandoned because, according to the Advisory Committee's report to the Standing Committee: ''[A] rule that attempts to address these issues in detail simply cannot be applied to the wide variety of cases in federal court, and a rule that provides only general guidance on these issues would be of little value to anyone.'' There was also a concern early in the process that propounding rules that were explicitly designed to change the substance of when a duty to preserve is triggered could violate the Rules Enabling Act, which generally limits the court's rule-making authority to ''procedural'' rules; substantive rules, on the other hand, generally must be enacted into law by Congress (Federal Rule of Evidence 502, which addresses substantive privilege and waiver issues, is a good example).

Thus, the proposed rules specifically defer to case law that uniformly holds that a duty to preserve is triggered when litigation is reasonably anticipated. Determining when litigation is ''reasonably anticipated'' is always a fact-specific analysis that depends on the unique facts and circumstances of each case.

BBNA: The Judicial Conference stated that the Rule 37(e) change would not affect state law tort claims for spoliation. So, does this mean that, in practice, little will change?

I don't think so. Most eDiscovery sanctions decisions since the rules were last amended in December 2006 are based upon Rule 37 or the court's inherent authority. It was rare for litigants to assert stand-alone claims based upon state-law tort claims. I predict that issues surrounding the loss if ESI will continue to be addressed under Rule 37, albeit applying the new standards.

BBNA: Do you predict that the new rules will be approved by the Supreme Court and Congress?

Weiner: I do. The Advisory Committee and the Standing Committee put an incredible amount of work into drafting the proposed amendments, including seeking extensive public comment from individuals and groups representing diverse interests. Through that process, it also became clear that there is a significant need to amend the rules to address the realities of litigating cases in today's digital age. Thus, the time is ripe for the proposed rules, and my hope is that around this time next year they will have been enacted and we will be talking about how courts are beginning to apply them.