E-Discovery and the Federal Rules of Civil Procedure: Significant Changes Ahead
by Jenya Moshkovich

Driven by the principles of proportionality and cooperation, the Federal Rules of Civil Procedure are undergoing significant changes particularly with respect to electronically stored information (“ESI”).

The proposed amendments were first introduced in August 2013 and followed by a six-month public comment period, which ran from August 15, 2013 to February 14, 2014 and resulted in substantial revisions to the proposed amendments. Over 2,300 written comments were submitted, many by the plaintiffs’ bar pushing back against the proposals intended to reduce the burden and expense of discovery on defendants. See e.g. Roberta L. Steele, Tour de Force: Draconian Proposed Changes To The Federal Rules Of Civil Procedure Withdrawn (Apr. 22, 2014), available at http://exchange.nela.org/blogs/roberta-steele/2014/04/22/fedrulesupdate ("In a major victory for plaintiffs' lawyers, the Committee announced that they unanimously withdrew the presumptive limit reductions on depositions, interrogatories and requests for admission, leaving those rules intact.").[1] On the other side of the fence, over 300 General Counsel and executives endorsed a joint statement of support for the amendments. See Thomas Y. Allman, The Civil Rules Package as Adopted by the Standing Committee 3 (May, 2014), available at http://www.ediscovery.com/cms/pdf/2014CommentsonRulePackage.pdf.

After the public comment period closed, the proposed amendments were revised by the Advisory Committee on Rules of Civil Procedure in April 2014 and approved by the Committee on Rules of Practice and Procedure (known as the “Standing Committee”) on May 29, 2014. The next step is review by Judicial Conference of the United States, followed by the Supreme Court. Lastly, if Congress has no objections, the amendments become effective on December 1, 2015.

A number of amendments are under consideration with Rules 26, 34, and 37(e) proposed to undergo the most changes.[2]

Perhaps the most likely to reduce the burdens imposed by oppressive requests for ESI, Rule 26(b)(1) would be amended to add that scope of discovery must be “proportional to the needs of the case.” Committee On Rules Of Practice And Procedure, 80 ("Proposed Rules") (May 29, 2014), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2014-05.pdf. Although the proposed language is not new, it is repositioned from present Rule 26(b)(2)(C)(iii) to Rule 26(b)(1) to emphasize the importance of proportionality. The proposed Rule lists the factors to be considered in determining what is proportional, including: “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.” Id. The draft Committee Note to Rule 26 explains that the change does not place the burden of addressing all proportionality considerations on the requesting party nor permit the opposing party to “refuse discovery simply by making a boilerplate objection that it is not proportional.” Id. at 83. The Committee Note further emphasizes that ensuring proportionality is the “collective responsibility” of the parties and the court. Id. The factors to consider are similar but not identical to the current 26(b)(2)(C)(iii) factors with “the importance of the issues at stake in the action” moving to the front and “the amount in controversy” moving further back.

In addition, the current Rule 26(b)(1) language, which provides examples of discoverable matters as “including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter” would be deleted. The draft Committee Note explains that these examples are unnecessary because “discovery of such matters is so deeply entrenched in practice.” Id. at 84.
The proposed amendment also deletes the following two sentences from Rule 26(b)(1):

For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action; and

Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

Id. at 80. With respect to the first deletion, the Committee Note explains that this language is rarely invoked and proportional discovery relevant to any party’s claim or defense should be sufficient given a proper understanding of what is relevant to a claim or defense. Id. at 84. The second deletion was made because the language has been used to incorrectly define the scope of discovery with reliance on the “reasonably calculated” phrase. Id. at 85. Instead, the deleted language would be replaced to state that “Information within this scope of discovery need not be admissible in evidence to be discoverable.” Like the deleted language, the proposed language would similarly state that nonprivileged information is discoverable so long as it is within the scope of discovery, even if it would not be admissible in evidence, but would no longer warrant expanding discovery beyond the permitted scope. Id. at 70.

Another important proposed change to Rule 26 is in paragraph (c)(1), relating to protective orders. The change would add the allocation of expenses to 26(c)(1)(B) as one way a court could protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. Id. at 80-81. This change would be helpful to responding parties in asymmetrical discovery situations, although the Committee Note cautions that this authority already exists and the explicit recognition of it does not alter the assumption that the responding party ordinarily bears the costs of responding or imply that cost-shifting should become a common practice. Id. at 86.

A proposed amendment to Rule 26(d), which relates to the timing and sequence of discovery, provides for an early Rule 34 discovery request that could be served on a party more than 21 days after the summons and complaint were served and specifies that the request will be considered as served at the first Rule 26(f) conference. Id. at 81.

Rule 26(f) would be amended to explicitly include preservation of electronically stored information as a topic to be included in the discovery plan along with a Federal Rule of Evidence 502 protective order, governing inadvertent disclosure of information protected by the attorney-client privilege and work product. Id. at 81.

Rule 16, which addresses pretrial conferences, would be amended to match some of the changes to Rule 26, by noting that the scheduling order may include a provision regarding the preservation of ESI, incorporate agreements governing inadvertent disclosure pursuant to FRE 502(d), and “direct that before moving for an order relating to discovery, the movant must request a conference with the court” in the hopes that the discovery dispute may be resolved at the conference without the need for a formal motion. Id. at 78-79. The time to issue a scheduling order would be reduced from 120 to 90 days after service of the complaint or from 90 to 60 days after any defendant has appeared unless the judge finds good cause for delay. Id. at 78.

Rule 34 also would be amended to require that an objection to a request to produce be stated “with specificity” and state whether any responsive materials are being withheld on the basis of that objection. Id. at 78. The change would permit a responding party to state that it will produce copies of documents or ESI instead of permitting inspection, and state a reasonable time for the response. Id.

The Committee Note explains that objections may continue to state that a request is overbroad, but if the objection recognizes that some part of the request is appropriate, the objection should explicitly state the scope that is not overbroad. Id. at 89. An example provided in the Committee Note is “a statement that the responding party will limit the search to documents or electronically stored information created within a given period of time prior to the events in suit, or to specified sources.” Id.

Rule 37, governing sanctions, was perhaps the most controversial proposed amendment and underwent a number of revisions. With these changes, the drafters hoped to establish more uniformity in addressing loss of electronically stored information and relieving the current need for “massive and costly over-preservation,” which many companies now engage in to avoid the risk of sanctions. Id. at 306.

The final proposal is as follows:
Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

(e) Failure to Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court may:

(1) upon finding prejudice to another party from loss of the information, order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information’s use in the litigation:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

The proposed rule is intended to limit a court’s power to impose sanctions, which was granted by the current rule, and to create a uniform standard for imposing sanctions when ESI is lost. “[The proposed rule] authorizes and specifies measures a court may employ if information that should have been preserved is lost, and specifies the findings necessary to justify these measures.” Id. at 318.

The proposed Rule 37(e) would apply only when a party loses ESI that: (1) the party was obligated to preserve in the anticipation or conduct of litigation; (2) the party failed to take reasonable steps to preserve; and (3) the ESI cannot be restored or replaced through additional discovery. If these three elements are met, a court may only order measures that are no greater than necessary to cure any prejudice to the opposing party absent a finding that “the party acted with the intent to deprive another party of the information’s use in the litigation.” Only if intent to deprive is found may the court employ the most serious sanctions of an adverse inference or a default judgment, which some courts have employed under the current rule upon finding mere negligence.

In summary, if adopted—which appears likely—the proposed amendments would improve the current state of electronic discovery by emphasizing proportionality and requiring more cooperation among litigants from the onset of a lawsuit.

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[1] Proposed amendments left on the cutting room floor include: Rule 30: Reducing a presumption of 10 oral depositions to 5, with a deposition limited to one day of 6 hours, down from 7 hours; Rule 31: Reducing a presumption of 10 written depositions to 5; Rule 33: Reducing a presumption of 25 interrogatories to 15; and Rule 36: Limiting requests to admit to 25, including all discrete subparts (except as to requests to admit the genuineness of any described document).

[2] Some of the other proposed amendments include changing Rule 1 to emphasize that both the court and the parties share the responsibility of utilizing the rules to secure the just, speedy, and inexpensive determination of every action. Rule 4 would change the time for serving a defendant from 120 to 90 days after a complaint is filed.