Federal Discovery in the "Proportionality" Era

Basic Principles, Practical Implications

Honorable Peter G. Sheridan, U.S.D.J.
Honorable Michael A. Shipp, U.S.D.J.
Honorable Tonianne J. Bongiovanni, U.S.M.J.
Honorable Douglas E. Arpert, U.S.M.J.
Vincent E. Gentile, Esq. (Drinker Biddle & Reath)
William F. Cook, Esq. (Brown & Connery)

Say what?

Agenda

- Overview of rule changes expected for December 2015
- Understanding "proportionality"
- Practical impact of the new Rule 26(b)(1)
  - Document requests
  - Interrogatories
  - Depositions

Agenda (cont.)

- Rule 37(e) – ESI
- Additional changes

2015: The Expected Changes

- Rule 1: Scope and Purpose
- Rule 4(m): Time for Service; "Appendix"
- Rule 16(b): Scheduling
- Rule 26(b): Scope of Discovery
- Rule 26(c): Protective Orders

2015: The Expected Changes (cont.)

- Rule 26(d): Early document requests
- Rule 26(f): Joint Discovery Plan
- Rule 34: Document Requests

2015: The Expected Changes (cont.)

- Rule 37(e): Failure to ~~Provide~~ Preserve ESI
- Rule 55(c): Setting Aside a Default or a Default Judgment
- Rule 84: Forms
- Appendix of Forms

Wow…

Time Frames

Rule changes will go into effect on
December 1, 2015
(assuming Supreme Court approval by May 1, 2015 and no action by Congress)

Dateline 2008

- Mounting complaints about cost, delays and burdens of civil litigation in federal courts
- Average outside litigation cost per Fortune 200 company was nearly $115 million in 2008, up 73% from percent from $66 million in 2000
- 1000:1
  - Ratio of pages discovered to exhibit pages

Civil Justice Reform Group, et al., "Litigation Cost Survey of Major Companies"

Dateline 2008

- 81% of ACTL Fellows agreed that the civil justice system is too expensive
- 69% of Fellows said that the civil justice system takes too long
- 68% of Fellows agree that the potential of litigation costs inhibits the filing of civil cases
- *"There is a serious concern that the costs and burdens of discovery are driving litigation away from the court system and forcing settlements based on the costs,*
- *as opposed to the merits, of cases."*

ACTL & IAALS, Interim Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System (2008)

Dateline 2008

- **Late 2008**: Standing Committee asks Advisory Committee to hold a conference on the issues of cost and delay in the federal civil-litigation system
- **January 2009**: Advisory Committee schedules conference to be held at Duke University School of Law in May 2010 to determine whether it is necessary to "totally rethink the current approach taken by the civil rules to litigation."

Hon. John Koeltl, "Progress in the Spirit of Rule 1," 60 Duke L.J. 537 (2010); Mary Kay Kane, Pretrial Procedural Reform and Jack Friedenthal, 78 GEO. WASH. L. REV. 30, 38 (2009).

Coach K

May 2010: The Duke Conference

- Two-day conference with eleven panels attended by judges, lawyers, academics, and users of the system, including government, corporations, and groups representing individual litigants and public interest causes
- Scores of articles, studies, and commentary submitted
- "[N]early unanimous agreement that the disposition of civil actions could be improved, reducing cost and delay, by advancing cooperation among the parties, proportionality in the use of available procedures, and early and active judicial case management."

Hon. John Koeltl, "Progress in the Spirit of Rule 1," 60 Duke L.J. 537 (2010); Advisory Committee Report to Standing Committee, May 2014.

After Duke

- Advisory Committee prepares rule proposals; vets them at "mini-conferences"
- August 2013: Standing Committee approves *publication* of "Duke Package"
- Maximum capacity hearings in Washington, D.C., Phoenix, and Dallas
- 120 testifying witnesses

Thomas Y. Allman, "The Civil Rules Package As Approved By the Judicial Conference" (September 18, 2014)

After Duke

- Over 3200 written comments
- Includes extensive comments from the Lawyers for Civil Justice ("LCJ"), American Association for Justice, the Federal Magistrate Judges Association, the Association of Corporate Counsel, the Department of Justice, and the Sedona Conference®

Thomas Y. Allman, "The Civil Rules Package As Approved By the Judicial Conference" (September 18, 2014)

2014

- **April 2014**: Advisory Committee reviews and finalizes proposals; recommends adoption
- **May 2014**: Standing Committee accepts recommendations of Advisory Committee
- **September 2014**: Judicial Conference accepts recommendations; submits to Supreme Court for adoption

Report of the Advisory Committee on Civil Rules (May 2014); Thomas Y. Allman, "The Civil Rules Package As Approved By the Judicial Conference" (September 18, 2014)

Next Steps

- Rules currently pending before Supreme Court
- If the rules are adopted and submitted to Congress prior to May 1, 2015, they would become effective on December 1, 2015 if legislation is not adopted to reject, modify, or defer them

Thomas Y. Allman, "The Civil Rules Package As Approved By the Judicial Conference" (September 18, 2014)

The BIG Story

- ***Rule 26(b)(1)***
- ***Rule 37(e)***

Rule 26(b)(1) - NOW

- Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense--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. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).

Rule 26(b)(1) - NEW

- Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense ***and 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. Information within this scope of discovery need not be admissible in evidence to be discoverable.***

What Changed?

- The proportionality factors located in current Rule 26(b)(2)(C)(iii) are moved up to become part of the scope of discovery
- The examples recognizing discovery of the existence of documents or tangible things and the identity of persons who have knowledge of discoverable matter are eliminated

Advisory Committee Note to Rule 26 (2014); Report of the Advisory Committee on Civil Rules (May 2014)

What Changed?

- The current reference to the discovery of information relevant to the ***subject matter*** of the action, on showing good cause, is eliminated

and….

Advisory Committee Note to Rule 26 (2014); Report of the Advisory Committee on Civil Rules (May 2014)

What Changed?

The provision allowing discovery of inadmissible information "reasonably calculated to lead to the discovery of admissible evidence" is ***eliminated***

Yikes…

Order in the Court

Change No. 1: Proportionality

- Widespread support at the Duke Conference that discovery should be limited to what is ***proportional*** to the needs of the case
- As to ***meaning***, Advisory Committee borrows the factors currently in Rule 26(b)(2)(C)(iii)

Advisory Committee Note to Rule 26 (2014); Report of the Advisory Committee on Civil Rules (May 2014)

Proportionality

- While proportionality has been in Rule 26 since 1983, it has not been given proper emphasis; placement in Rule 26(b)(1) will make it more prominent
- "The present amendment restores the proportionality factors to their original place in defining the scope of discovery."

Advisory Committee Note to Rule 26 (2014); Report of the Advisory Committee on Civil Rules (May 2014)

Proportionality

- "Restoring the proportionality calculation to Rule 26(b)(1) does not change the existing responsibilities of the court and the parties to consider proportionality, and the change does not place on the party seeking discovery the burden of addressing all proportionality considerations."

Advisory Committee Note to Rule 26 (2014)

Proportionality

- "Nor is the change intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional. The parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes."

Advisory Committee Note to Rule 26 (2014)

Factors

- ***The "issues at stake in the action"***
- ***The amount in controversy***
- ***The parties relative access to relevant information***

Factors

- ***The parties' resources***
- ***The importance of the discovery in resolving the issues***
- ***Whether the burden or expense of the proposed discovery outweighs its likely benefit***

Factors

- ***"…the parties' relative access to relevant information"***
- Not currently in Rule 26(b)(2)(C)(iii)
- "This factor addresses the common concern that the frequently asymmetric distribution of information means that discovery often will impose greater burdens on one party than on another."

Report of the Advisory Committee on Civil Rules (May 2014)

Rule 26(b)(1) - Change No. 2

- *Current Rule 26:*

"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."

Rule 26(b)(1) - Change No. 2

- "Discovery of such matters is so deeply entrenched in practice that it is no longer necessary to clutter the long text of Rule 26 with these examples."
- "The discovery identified in these examples should still be permitted under the revised rule when relevant and proportional to the needs of the case."

Advisory Committee Note to Rule 26 (2014)

Rule 26(b)(1) – Change No. 3

- The distinction between discovery of matter relevant to the parties' claims or defenses and discovery of matter relevant to the subject matter of the action, on a showing good cause, is eliminated.
- "The Committee has been informed that this language is rarely invoked. Proportional discovery relevant to any party's claim or defense suffices, given a proper understanding of what is relevant to a claim or defense."

Advisory Committee Note to Rule 26 (2014)

Rule 26(b)(1) – Last But Not Least

*The provision allowing discovery of inadmissible information "reasonably calculated to lead to the discovery of admissible evidence" is **eliminated**.*

"Reasonably Calculated"

"The phrase has been used by some, incorrectly, to define the scope of discovery."

Advisory Committee Note to Rule 26 (2014)

"Reasonably Calculated"

- "As the Committee Note to the 2000 amendments observed, use of the 'reasonably calculated' phrase to define the scope of discovery 'might swallow any other limitation on the scope of discovery.'"
- The 2000 amendments sought to prevent such misuse by adding the word "Relevant" at the beginning of the sentence, making clear that "'relevant' means within the scope of discovery as defined in this subdivision . . . ."

Advisory Committee Note to Rule 26 (2014)

"Reasonably Calculated"

- "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."

Advisory Committee Note to Rule 26 (2014)

The (New) Basic Discovery Question

"Information is discoverable under revised Rule 26(b)(1) if it is ***relevant*** to any party's ***claim or defense*** and is ***proportional*** to the needs of the case."

Advisory Committee Note to Rule 26 (2014)

Practical Impact

- Global discovery versus the individual case
- "Relevant" versus "Relevant"
- Rule application versus case law development
- Rule 26(b) and Bell/Twombly

Proportionality – Document Review

- Current Rule 26(b) Analysis
  - Discovery is broader than admissibility
  - Is it reasonably likely to lead to the discovery of admissible evidence?
  - Is it privileged or otherwise protected?
  - Should probably produce, if not privileged

Proportionality – Document Review

- New Rule 26(b) Analysis
  - "Information is discoverable under revised Rule 26(b)(1) if it is relevant to any party's claim or defense and is proportional to the needs of the case."
  - "Not Proportional" cannot be used as a boilerplate objections
  - *Is the document "**relevant** to any party's **claim or defense**"?*

Proportionality – Document Review

- New Rule 26(b) Analysis (cont.)
  - Document does not have to be *admissible*
  - Information may be withheld if privileged or non-responsive

Proportionality – Document Review

- New Rule 26(b) Analysis (cont.)
  - "The 2000 Note offered three examples of information that, suitably focused, would be relevant to the parties' claims or defenses. The examples were 'other incidents of the same type, or involving the same product'; 'information about organizational arrangements or filing systems'; and 'information that could be used to impeach a likely witness.' Such discovery is not foreclosed by the amendments."

Advisory Committee Note to Rule 26 (2014)

Proportionality – Document Review

- New Rule 26(b) Analysis (cont.)
  - "Discovery that is relevant to the parties' claims or defenses may also support amendment of the pleadings to add a new claim or defense that affects the scope of discovery."

Advisory Committee Note to Rule 26 (2014)

Proportionality – Interrogatories

- Effect on common objections (vague, unduly burdensome)
- Use of "not proportional" or "disproportionate"
- "Not relevant to any party's claim or defense"

Proportionality – Depositions

- During the deposition
- Persons/entities to depose
  - 30(b)(6) Notice
- Protective orders

2015 Rule Changes

Rule 37(e)

Breaking News…

"[I]t is no exaggeration to say that many of the more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives—from the mundane to the intimate."

Chief Justice John Roberts,
Riley v. California,
134 S.Ct. 2473 (2015)

Reality Check

- "[M]odern cell phones…are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy."

Chief Justice John Roberts,
Riley v. California,
134 S.Ct. 2473 (2015)

Reality Check, Take 2

- "Nearly three-quarters of smart phone users report being within five feet of their phones most of the time, with 12% admitting that they even use their phones in the shower."

Harris Interactive, 2013 Mobile Consumer Habits Study (June 2013)

What We Know

- The duty to preserve evidence is triggered when it is reasonably foreseeable that the information will be requested in litigation.
- Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a "litigation hold" to ensure the preservation of relevant evidence.

What We Know

- Counsel must oversee compliance with the litigation hold, monitoring the party's efforts to retain and produce relevant evidence.
- The "duty to preserve" issue is a question of law to be determined by the court.

Scott v. IBM Corp., 196 F.R.D. 233 (D.N.J. 2000); *Major Tours, Inc. v. Colorel*, 2009 WL 2413631 (D.N.J. Aug. 4, 2009)

Rule 37(e)

- Currently, Rule 37(e) provides that, absent exceptional circumstances, "a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system."
- But current Rule 37(e) says ***nothing about how sanctions should be applied in the specific context of ESI.***

Rule 37(e)

Current Rule:

(e) **Failure to Provide Electronically Stored Information.** Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

Current Rule 37(e)

"This limited rule has not adequately addressed the serious problems resulting from the continued exponential growth in the volume of such information."

Advisory Committee Note to Rule 37 (2014).

The Result

- In this District, Rule 37(e)'s void has led to mixed case law on the issue of whether "intent" must be shown in order to obtain sanctions.
- *Mosaid Technologies Inc. v. Samsung Electronics Co., Ltd.*
  - *"Actual suppression" of ESI was not required as long as the loss of information caused prejudice.*

The Result, Part 2

- *Bensel v. Allied Pilots Association, et al.*
  - *269 boxes of documents were destroyed by defendant's document management company during litigation, but there was no finding of spoliation since there was no "specific evidence of fraud or bad faith."*

The Result, Part 3

Bull v. United Parcel Service, Inc., 665 F.3d 68 (3d Cir. 2012)

- Third Circuit resolves uncertainty
- Bad faith *is* required to show "actual suppression":

"[A] finding of bad faith is pivotal to a spoliation determination. This only makes sense, since spoliation of documents that are merely withheld, but not destroyed, requires evidence that the documents are actually withheld, rather than—for instance—misplaced. Withholding requires intent."

Post-*Bull*

- After *Bull,* thorny issues remain…
- **Is prejudice required for ESI sanctions?**
- **Which remedial measure (fees, adverse inference, dismissal) fits the case?**

New Rule 37(e)

- (e) **Failure to ~~Provide~~ Preserve Electronically Stored Information.** ~~Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.~~

New Rule 37(e)

- 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:
  - (1) upon finding prejudice to another party from loss of the information, may 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 may:
    - (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.

New Rule 37(e)

- Under the new version, the court must first address three threshold issues when ESI sanctions are sought:
  - ***(1) whether the ESI should have been preserved;***
  - ***(2) whether the ESI was actually lost because a party failed to take reasonable steps to preserve it; and***
  - ***(3) whether the ESI cannot be restored or replaced through additional discovery.***

New Rule 37(e)

- If all three threshold conditions are met, ***and there is a showing of prejudice***, then the court "may order measures no greater than necessary to cure the prejudice."
- For an adverse inference or an outright dismissal, however, the three threshold conditions must be met ***along with a finding "that the party acted with the intent to deprive another party of the information's use in the litigation" (prejudice is not required)***

New Rule 37(e)

- The mere fact that a party lost ESI due to its failure to take reasonable steps will not, by rule, warrant an adverse inference or dismissal unless the intent requirement is satisfied.
- Advisory Committee: "Intent" for purposes of the new rule is ***more*** than negligence or even ***gross*** negligence.

Advisory Committee Note to Rule 37 (2014)

"Intent to Deprive"

- Adverse inference or other sanctions require a showing that a party acted "***with the intent to deprive another party of the information's use in the litigation"***
- New rule "forecloses reliance on inherent authority or state law to determine when certain measures should be used."

Advisory Committee Note to Rule 37 (2014)

Advisory Committee

- Analysis applies only to ESI, and only applies when such information is actually lost
- "[L]oss from one source may often be harmless when substitute information can be found elsewhere."
- New rule does not create a new duty to preserve

Advisory Committee Note to Rule 37 (2014)

Prejudice

- "The rule does not place a burden of proving or disproving prejudice on one party or the other."
- "The rule leaves judges with discretion to determine how best to assess prejudice in particular cases."

Advisory Committee Note to Rule 37 (2014)

Rule 37(e) – Practical Impact

- Clearer guidance for adverse inference, fees, or dismissal
- Still, lesser sanctions, such as monetary relief, can be imposed where the three threshold conditions are met and there is a showing of prejudice.

Rule 37(e) – Practical Impact

- *Counsel on both sides should nip potential ESI issues in the bud early, by aggressively collecting client's data in preparation of forthcoming discovery requests.*
- *No better way to avoid e-discovery issues than being able to walk into the initial conference having already performed the necessary searches.*

Rule 37(e) – Practical Impact

- *Not enough to "trust the client" that the litigation hold has been implemented.*
- *Regular monitoring of preservation procedures is a must.*

Rule 37(e) – Practical Impact

- *Counsel should be willing to meet in-person with the client's information technology staff to gain familiarity with internal preservation systems.*
- *Preservation steps should be documented by counsel in case the litigation hold process becomes an issue later in the case.*

Other Rule Changes

- **Rule 1**
  - Amended to make clear that the just, speedy, and inexpensive determination of civil actions is the responsibility of the parties, not just the court
- **Rule 4**
  - Time to serve defendant after filing the Complaint is reduced from 120 days to 90 days

Other Rule Changes

- **Rule 16**
  - Scheduling Conferences are to be permitted in person or by telephone
  - Issuance of the first Scheduling Order is reduced from 120 days to 90 days after any defendant has been served, or 60 days after any defendant has appeared
  - The first Scheduling Order ***may*** provide for the preservation of ESI, incorporate claw-back agreements, and require parties to request a conference before filing a discovery motion

Other Rule Changes

- **Rule 26(d)(2)**
  - "Early" document requests are permitted where they are served more than 21 days after service of summons and complaint
  - The requests are considered "served" at the first Rule 26(f) conference

Other Rule Changes

- **Rule 34(b)(2)(C)**
  - Responses to document requests must indicate whether anything is actually being withheld on the basis of an asserted objection
- **Rule 55(c)**
  - Amended to make clear that a default judgment can be revised at any time until it becomes a ***final*** default judgment

Other Rule Changes

- **Rule 84 – Forms**
  - Rule 84 and the Appendix of Forms "are no longer necessary and have been abrogated" given "many excellent alternative sources for forms"
  - The "Waiver of Service" form used in connection with Rule 4 is now incorporated into Rule 4

A Final Word…

QUESTIONS AND ANSWERS