DATA AND DISCOVERY STRATEGIES CLIENT ALERT

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SHOOK HARDY & BACON

AMENDMENTS TO DISCOVERY RULES – HOW WILL YOU BE AFFECTED?

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It is widely expected that an amended version of the Federal Rules of Civil Procedure ("Rules") will go into effect in December of this year.[2] The proposed amendments – reflecting more than five years of effort by the Advisory Committee on the Federal Rules of Civil Procedure ("Advisory Committee") – focus on discovery in general and discovery of electronically stored information ("ESI") in particular.

This analysis summarizes the most important discovery-related changes and provides practical advice about what civil litigants and their counsel can expect once the amendments take effect.

Proposed Amendments

The proposed rule amendments are the federal judiciary's latest attempt to "increase realistic access to the courts" by reducing costs and delays associated with civil litigation.[3] It will come as no surprise to practitioners that the Advisory Committee's efforts in this vein focused on matters related to discovery. The costs and time spent on discovery-related aspects of litigation far outweigh all other pre-trial expenditures. A significant portion – if not a majority – of those costs are often attributable to ESI. And as the Advisory Committee recognized, "the remarkable growth of ESI will continue and even accelerate" in coming years.[4]

Thus, the Advisory Committee proposed the following amendments to Rules that provide the foundation for today's discovery practices:

- **Rule 1** is amended to emphasize that both the court *and the parties* have responsibilities to promote a "just, speedy and inexpensive" resolution to every case.
- **Rule 16** is amended in several ways:
    - To provide that if a scheduling order is not issued based upon the report of the parties' Rule 26(f) conference, then the court must

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hold a scheduling conference by means of direct simultaneous communication (i.e., not by written exchange).

- To reduce the time by which a scheduling order must be issued to the earlier of 90 days (from 120 days) after service of the complaint or 60 days (from 90 days) after any defendant has appeared.
- To explicitly permit the incorporation of three items into the scheduling order:
  - A preservation order;
  - An agreement under Federal Rule of Evidence 502 ("Rule 502") regarding protection of privileged information; and
  - A requirement that an informal court hearing be had before the filing of any discovery motions.

- **Rule 26** is amended in several ways:
  - To clarify the appropriate scope of discovery – i.e., that information is discoverable if it is "relevant to any party's claim or defense and proportional to the needs of the case."
  - As part of the aforementioned clarification, to delete of the phrase "reasonably calculated to lead to the discovery of admissible evidence."
  - To explicitly recognize that protective orders may allocate discovery costs.
  - To permit parties to serve Rule 34 requests (requests for production or inspection) before a Rule 26(f) conference has been held, as early as 22 days after service of the complaint.
  - To add two items to be addressed in discovery plans: preservation issues and Rule 502 agreements.
- **Rules 30, 31 and 33** are amended to "reflect the recognition of proportionality" in Rule 26.
- **Rule 34** is amended in several ways:
  - To require that objections to Rule 34 requests be made with specificity.

- To require that the responding party state whether any responsive docs are being withheld based on objections.
- To clarify that a responding party can state that it will produce documents or ESI in lieu of an inspection.
- To require that any such production be completed no later than the time for inspection stated in the request or a later reasonable time stated in the response.

- **Rule 37** is amended to replace the existing Rule 37(e) with entirely new language designed to establish a uniform standard for dealing with ESI loss.
  - Under the proposed amendments, the rule applies only if four initial elements are established:
    1. The ESI should have been preserved in the anticipation or conduct of litigation;
    2. A party failed to take reasonable steps to preserve the ESI;
    3. As a result, the ESI was lost; and
    4. The ESI could not be restored or replaced by additional discovery.[5]
  - If those four elements are established, then
    - Under Rule 37(e)(1), ***curative measures*** are appropriate if the ESI loss caused ***prejudice*** to another party. The court is given broad discretion to impose appropriate measures, but they must be "no greater than necessary to cure the prejudice."
    - Under Rule 37(e)(2), certain proscribed ***sanctions*** are appropriate "only upon finding that the party acted with the ***intent to deprive*** another party of the information's use in the litigation." (No prejudice is required.) In such a situation, the court may (a) presume the lost ESI was unfavorable, (b) give an adverse inference jury instruction, or (c) dismiss the action or enter a default judgment.
  - The court retains discretion; the amended rule does not require a curative measure or sanction in any circumstance.

Practical Effects of Proposed Amendments

As mentioned above, the overarching goal of these proposed amendments is to make civil litigation quicker and less costly. The Advisory Committee seeks to achieve this goal by effecting three primary changes: (1) greater involvement by the court, (2) increased cooperation among the parties, and (3) incorporation of proportionality into all aspects of discovery. But by and large, the means for achieving these changes are amendments that emphasize or clarify options and requirements under the existing Rules rather than amendments that change existing obligations. As such, the achievement of these changes will depend largely on the willingness of all involved – parties and counsel on both sides of the "v" and the judges, magistrates and special masters charged with managing these matters – to work toward the end goal.[6]

That said, the amended Rules will **require** at least some change to three important aspects of discovery: (1) speed, (2) specificity, and (3) assessing claims of lost ESI. Civil litigants and their counsel should be prepared to adjust their practices accordingly.

Be Prepared to Act Sooner

If amended Rule 16 becomes effective, the court will typically have 30 fewer days to issue a scheduling order.[7] This, in turn, means that the parties will have to hold their Rule 26(f) conference and serve their Rule 26(f) report to the court roughly a month earlier than required under the existing Rules.[8]

With the potential to add additional time pressure, amended Rule 26 would allow parties to issue requests for production of documents ("RFP") as early as 22 days after service of the complaint.[9] Such an RFP will be considered "served" as of the Rule 26(f) conference,[10] which means a response would be due within 30 days of the conference. [11]

The following chart compares the effect of the amendments on the court's and parties' obligations – assuming no extensions or finding of good cause for delay – using a hypothetical in which the defendant was served with plaintiff's complaint on June 1, 2015.

	UNDER EXISTING RULES	UNDER PROPOSED RULES
Complaint served	Monday, June 1	Monday, June 1
RFP delivery[12]	As soon as Monday, September 7 (after 26(f) conference)	As soon as Monday, June 23
26(f) conference[13]	By Monday, September 7	By Monday, August 10
Response to RFP[14]	By Wednesday, September 9	By Wednesday, September 9
26(f) conference report[15]	By Monday, September 21	By Monday, August 24
Scheduling order[16]	By Monday, September 28	By Monday, August 31

The delayed-service effect means that the client and its counsel would have more time to respond to an early-delivered RFP than they have to respond to the first RFP under the existing Rules. But don't be falsely assuaged by the time for response.

Because the early-delivered RFP is likely to drive much of the discussion at the Rule 26(f) conference,[17] at least some of the legwork that would go into preparing an RFP response will likely need to be undertaken in the much-smaller window of time between receipt of the early-delivered RFP and the Rule 26(f) conference. Parties should be prepared to discuss the specific requests and whether they pose any particular concerns with respect to relevance, proportionality, burden and/or expense. This will require that the responding party's counsel has an understanding of, at least, whether and where responsive data might exist, the party's preservation and retention policies affecting that data, and what would be required to collect, review and produce that data. If that information is not already within counsel's arsenal of knowledge, it must be attained in the relatively brief window of time before the Rule 26(f) conference.

Be Prepared to Be Specific

The proposed amendments to Rule 34 largely focus on specificity in a responding party's objections and answers to an RFP. If the amendments are adopted, a responding party must object "with specificity" and "state whether any responsive material are being withheld on the basis of that objection."[18] The required specificity must be sufficient to "alert other parties to the fact that documents have been withheld and thereby facilitate an informed discussion of the objection."[19] Thus, for example,

a party objecting to a request as overbroad must state as much and, if some part of the request is appropriate, must also "state the scope that is not overbroad."[20] An objection that states the date and/or subject matter limits that will control the responding party's search for responsive and relevant materials would be sufficient.[21]

The amended Rule 34 will also require responding parties to be specific about when information responsive to RFPs will be produced. If the responding party will not be producing documents at the time specified in the request, the party must specifically identify "another reasonable time" by which production will be complete.[22] In circumstances in which production is made in waves or in stages, the responding party must "specify the beginning and end dates of the production."[23]

In addition to the specificity required under the proposed amendments to Rule 34, litigants can expect that specificity will be required if and when they assert objections to any discovery requests on grounds of proportionality. The Advisory Committee notes that the proportionality-related amendment to Rule 26 is not "intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional."[24] The proposed proportionality-related amendment to Rule 26 garnered more opposition during the public comment period than any other proposed amendment.[25] This opposition was based, at least in part, on the mistaken belief that the amendment shifts the "burden of proof" of the proportionality of discovery requests onto the requesting party.[26] This misconception was corrected at the public hearings and in the Advisory Committee note to the proposed amended Rule 26.[27] And responding parties can safely bet that requesting parties will accordingly demand – and courts will require – specificity for any proportionality-based objections.[28]

Be Prepared to Reassess Preservation Practices

Under case law applying the existing Rules, a party facing spoliation claims is held to different standards in different federal courts and, in some courts, risks severe sanctions upon a finding of mere negligence.[29] Additionally, courts have evaluated and imposed spoliation claims based on a duty to preserve running to ESI that is "reasonably calculated to lead to the discovery of admissible evidence."[30]

In light of these inconsistent standards and broadly interpreted scope of discovery, many companies today preserve most or all of the ESI they generate for fear of sanctions if the next court to address the issue concludes that the party's preservation efforts were unreasonable. Recognizing that such over-preservation of ESI can lead to increased costs and inefficiencies relating to discovery,[31] the Advisory Committee has proposed two amendments that will require some courts to modify their existing approaches to assessing claims of spoliated ESI.[32] This, in turn, should provide a firmer basis for companies to make more reasonable preservation decisions.

The first such amendment is the deletion of the phrase "reasonably calculated to lead to the discovery of admissible evidence" from Rule 26's description of the scope of discovery. As noted by the Advisory Committee, this "phrase has been used by some, incorrectly, to define the scope of discovery" and has had the effect of swallowing other limitations on the appropriate scope.[33] As amended, Rule 26 will correctly define the scope of discovery as information that is "relevant to any party's claim or defense and proportional to the needs of the case."[34]

The second such amendment is the "uniform standard" in Rule 37(e) for addressing claims of lost ESI. If the amendments become effective, the new uniform standard will:

- Impose a "reasonableness" threshold – Sanctions or "curative" measures can be imposed only if the party failed to take reasonable steps to preserve ESI that should have been preserved in the anticipation or conduct of litigation; and
- Require a finding of prejudice or bad faith – The amended rule recognizes that a party's failure to preserve ESI does not, by itself, show bad faith and does not inherently prejudice the opposing party. "Curative" measures can be imposed only upon a finding of prejudice and only as sufficient to "cure" the prejudice. Proscribed sanctions can be imposed only upon a finding of intent to deprive another party of the lost ESI's use in the litigation.[35]

Notably, the Advisory Committee proposed the Rule 37(e) amendments for the explicit purpose of addressing the problem of over-preservation by parties in or anticipating litigation.[36] The reasoning of the Advisory Committee with respect to amended Rule 37 (and the adoption of that

reasoning by the Standing Committee, Judicial Conference and Supreme Court) provides a clear signal that over-preservation need not continue.

Companies should accept this implicit invitation to reassess their internal preservation policies, processes and practices. With the Rule 26 amendment, companies can be secure in making ESI preservation decisions based on what is relevant and proportional, omitting ESI that might be "reasonably calculated to lead to the discovery of admissible evidence" but that is not itself relevant. And under an amended Rule 37(e), companies will be protected from sanctions as long as they have taken "reasonable steps" to preserve ESI and do not delete ESI with the intent of preventing its use in litigation. Adjustment of existing practices from the preservation of most or all ESI to more reasonable preservation efforts aimed at relevant ESI will help companies to reduce their overall preservation and discovery spend and will help parties to focus on matters truly relevant to the litigation, thereby reducing the time to resolution of their disputes.

ENDNOTES

1 The firm thanks Jesse Weisshaar, Of Counsel in Washington, D.C., for exceptional work in drafting this analysis.

2 The Supreme Court of the United States approved the proposed amendments in late April 2015. Absent any action by Congress to revise or reject the proposed amendments, they will take effect on December 1, 2015.

At least one court has already begun incorporating the new rules into its analyses. *See HM Electronics, Inc. v. R.F. Technologies, Inc.*, No. 12-cv-2884, Doc. # 420 (S.D. Cal. Aug. 7, 2015) (analyzing claim for sanctions under existing and proposed Rule 37(e)).

3 Advisory Committee Memorandum to Standing Committee, June 2014 ("Advisory Committee Memo"), at 13.

4 *Id.* at 15.

5 The Advisory Committee points out that "[n]othing in the rule limits the court's powers under Rules 16 and 26 to authorize additional discovery. Orders under Rule 26(b)(2)(B) regarding discovery from sources that would ordinarily be considered inaccessible or under Rule 26(c)(1)(B) on allocation of expenses may be pertinent to solving such problems." Proposed Rule 37 Advisory Committee Note (Advisory Committee Memo, at 62).

6 *See, e.g.,* Mark A. Behrens & Ginny Knapp Dorell, *Changes to U.S. Court Rules Would Improve Civil Litigation*, LawyerIssue, at 37 (Mar 2015) ("The 'black letter' in the new Rules will provide a modest help. If judges and litigants embrace the spirit of the changes, the changes could be even more dramatic.").

7 *Compare* (Existing) Rule 16(b)(2) *with* Proposed Rule 16(b)(2).

8 (Existing) Rule 26(f)(1) and (2).

9 Proposed Rule 26(d)(2)(A).

10 Proposed Rule 26(d)(2)(B).

11 (Existing) Rule 34(b)(2)(A). *See also* Proposed Rule 34(b)(2)(A).

12 *See* (Existing) Rule 26(d)(1); Proposed Rule 26(d)(2)(A).

13 *See* (Existing) Rule 26(f)(1).

14 *See* (Existing) Rule 34(b)(2)(A); Proposed Rule 26(d)(2)(B); Proposed Rule 34(b)(2)(A).

15 *See* (Existing) Rule 26(f)(2).

16 *See* (Existing) Rule 16(b)(2); Proposed Rule 16(b)(2).

17 The Advisory Committee members envision that the early RFP delivery will "facilitate focused discussion during the Rule 26(f) conference." Proposed Rule 26 Advisory Committee Note (Advisory Committee Memo, at 45). And it is probably safe to assume that any party taking advantage of the early-delivered RFP will be expecting this "focused discussion."

18 Proposed Rule 34(b)(2)(B) and (C).

19 Proposed Rule 34 Advisory Committee Note (Advisory Committee Memo, at 54).

20 *Id.* (Advisory Committee Memo, at 53).

21 *Id.* (Advisory Committee Memo, at 54).

22 Proposed Rule 34(b)(2)(B).

23 *Id.*

24 Proposed Rule 26 Advisory Committee Note (Advisory Committee Memo, at 39).

25 *See generally*, Nov. 2013 Public Hearing; Jan. 2014 Public Hearing; Feb. 2014 Public Hearing.

26 *See, e.g.*, Feb. 2014 Public Hearing, Testimony of Advisory Committee Member Parker C. Folse, at 34.

27 *See, e.g., id.*; Proposed Rule 26 Advisory Committee Note (Advisory Committee Memo, at 40) (parties' responsibilities with respect to a disagreement regarding proportionality "would remain as they have been since 1983.").

28 *See, e.g.*, Duke Law Center for Judicial Studies, *Draft Guidelines and Suggested Practices for Implementing the 2015 Discovery Amendments to Achieve Proportionality*, at Guideline 2(F) (Aug. 2015), available at https://www.law.duke.edu/sites/default/files/centers/judicialstudies/guidelines_and_suggested_practicesthird_draft.pdf (suggesting that a party objecting on the basis of disproportionality will generally bear the burden of showing the nature and extent of the burden, expense, etc. Conversely, the requesting party will generally bear the burden of explaining the likely benefit of the proposed discovery.).

29 *Compare Aramburu v. Boeing Co.*, 112 F.3d 1398, 1407 (10th Cir. 1997) (adverse inference instructions must be predicated on bad faith) *with Residential Funding Corp. v. DeGeorge Finan. Corp.*, 306 F.3d 99, 108 (2d Cir. 2002) (adverse inference instructions appropriate upon finding of negligence).

30 *See, e.g., Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217 (S.D.N.Y.2003) (a litigant "'is under a duty to preserve what it knows, or *reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence*, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request . . . .'") (quoting *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 72 (S.D.N.Y.1991); *William T. Thompson Co. v. General Nutrition Corp.*, 593 F. Supp. 1443, 1455 (C.D. Cal. 1984)) (emphasis added).

31 Advisory Committee Memo, at 17-18; Proposed Rule 37 Advisory Committee Note (Advisory Committee Memo, at 58).

32 Proposed Rule 37(e) "forecloses reliance on inherent authority or state law to determine when certain measures should be used." But of course, the Rules are binding only in federal courts. State laws and state court rules may draw different lines. But most states have adopted the Rules in whole or in part and even those that have not are likely to be informed by the proposed amendments. In fact, such an "informing" effect may be accelerated given that many states have adopted or are considering the adoption of civil discovery reform measures. *See, e.g.*, IAALS, Rule One Initiative: Action on the Ground, available at: http://iaals.du.edu/initiatives/rule-one-initiative/implementation (mapping and describing efforts to increase "access, efficiency and accountability," including several discovery-focused efforts, in courts across the country).

33 Proposed Rule 26 Advisory Committee Note (Advisory Committee Memo, at 44). *See also* Advisory Committee Memo, at 9-10 (explaining original intent of language and elaborating on the misplaced reliance on this phrase by courts and parties to define the scope of discovery).

34 Proposed Rule 26(b)(1).

35 *See* Proposed Rule 37(e).

36 Advisory Committee Memo, at 18.