

## BEYOND THE FEDERAL JUDICIARY: STATES' SELECTIVE EMBRACE OF THE AMENDED E-DISCOVERY FRCP

The Federal Rules of Civil Procedure (FRCP) have long had a strong influence on their state counterparts,<sup>1</sup> and many commentators have predicted that the 2015 FRCP amendments relating to electronic discovery will have similar influence.<sup>2</sup> After having more than a year to observe federal courts' application and interpretation of the 2015 FRCP amendments, state courts have responded to the federal judiciary's most recent attempt to reform the discovery process with varying degrees of enthusiasm.

### Rules

The processes to amend court rules are frequently lengthy, often taking years to effect changes.<sup>3</sup> But at least five states have taken early action to amend their own rules of civil procedure based on the 2015 FRCP amendments.

#### Arizona

On September 2, 2016, Arizona adopted certain amendments to its Rules of Civil Procedure, which became effective January 1, 2017.<sup>4</sup> These changes include:

- adopting FRCP 1's language extending to the parties the obligation to ensure the "just, speedy and inexpensive" resolution of civil cases;<sup>5</sup>
- adopting FRCP 26(b)(1)'s scope of discovery and proportionality factors into Arizona Rules 16(a) (identifying objectives of civil court management)<sup>6</sup> and 26(b)(1) (establishing discovery scope and limits);<sup>7</sup>
- amending Arizona Rule 34 to require—as does its federal counterpart—that responses to requests for production object with specificity and state "whether any responsive materials are being withheld on the basis of" such objections;<sup>8</sup> and
- adopting a new provision governing sanctions for spoliation of electronically stored information (ESI) that closely tracks FRCP 37(e).<sup>9</sup>

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MARCH 2017

### Colorado

In July 2015—months before the 2015 FRCP amendments went into effect—several relevant changes to the Colorado Rules of Civil Procedure became effective:

- Colorado Rule 1 was amended to track the then-proposed language of FRCP 1.<sup>10</sup>
- Colorado Rule 16 was amended in several respects. Although the revised Colorado rule does not closely mirror its amended federal counterpart, Colorado made several of its amendments with an eye toward involving judges “directly and early” in the litigation process,<sup>11</sup> a goal shared with the FRCP amendments.<sup>12</sup>
- Described as “[p]erhaps the most significant” change,<sup>13</sup> Colorado Rule 26(b)(1) was amended to adopt the scope of discovery of its amended federal counterpart.<sup>14</sup>
- Colorado Rule 34 was “changed to adopt similar revisions as those” made in amended FRCP 34.<sup>15</sup>

Notably, Colorado did not adopt any amendments to its Rule 37 that were modeled on FRCP 37(e).

### Massachusetts

Before the 2015 FRCP amendments became effective, Massachusetts proposed amendments to Rule 1 and Rule 26(b)(1) of the state’s Rules of Civil Procedure, with both proposed amendments mirroring their then-proposed federal counterparts.<sup>16</sup>

The proposed change to Massachusetts Rule 1 was adopted and became effective in August 2016.<sup>17</sup> The proposal to amend Massachusetts Rule 26(b)(1) was not adopted, as the Massachusetts bar and judiciary preferred instead to adopt a “wait and see” approach that would allow review of how the federal amendments affect litigants and civil litigation prior to considering whether similar amendments should be adopted in Massachusetts.<sup>18</sup> As a compromise—“at least until there is sufficient experience under the federal amendments”—the Supreme Judicial Court of Massachusetts adopted an amendment to the protective order language of Rule 26(c) adding factors for consideration, including factors that closely track the proportionality factors listed in amended FRCP 26(b)(1).<sup>19</sup>

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CLIENT ALERT**

MARCH 2017

**Ohio**

When the Supreme Court of Ohio amended its Rule of Civil Procedure 37 in July 2016, it made changes adopting certain stylistic and substantive provisions of FRCP 37 but explicitly did “not incorporate the 2015 changes made to” the federal rule.<sup>20</sup> Information relating to the amendment process does not elucidate whether Ohio’s Commission on the Rules of Practice and Procedure merely thought such incorporation premature at this point or whether the Commission expressly considered and rejected the federal approach to sanctions for spoliation of ESI.

**Washington**

In June 2015, the Washington State Bar Association’s (WSBA) Task Force on the Escalating Cost of Civil Litigation<sup>21</sup> recommended amendments to the state’s Rules of Civil Procedure 1, 26(b)(1) and 37 that were largely patterned after the then-proposed amendments to the FRCP.<sup>22</sup> In July 2016, after a public comment period, the WSBA’s Board of Governors rejected the recommendations to adopt language patterned after FRCP 26(b)(1) and 37(e), approving only the recommendation with respect to Rule 1.<sup>23</sup> The proposed amendment to Washington’s Rule 1 remains pending.<sup>24</sup>

These five states that have taken early action with respect to the 2015 FRCP amendments provide a scorecard of sorts on state courts’ embrace of the 2015 FRCP amendments, with FRCP 1 the obvious “winner” in terms of broad acceptance and FRCP 37(e) taking “last place.”<sup>25</sup>

	<b>FRCP 1</b> <i>court and parties obligated to secure just, speedy and inexpensive resolution</i>	<b>FRCP 16</b> <i>early and active judicial case management</i>	<b>FRCP 26(B)(1)</b> <i>scope of discovery = relevant and proportional</i>	<b>FRCP 34</b> <i>object with specificity</i>	<b>FRCP 37(E)</b> <i>sanctions for ESI spoliation</i>
<b>ARIZ.</b>	Adopted	--	Adopted	Adopted	Adopted
<b>COLO.</b>	Adopted	Concept incorporated	Adopted	Adopted	--
<b>MASS.</b>	Adopted	--	Rejected (for now)	--	--
<b>OHIO</b>	--	--	--	--	Expressly “not incorporate[d]”
<b>WASH.</b>	Adoption recommended	--	Rejected	--	Rejected
<b>TALLY</b>	4/4	1/1	2/4	2/2	1/3

## Cases

Very few state court cases have acknowledged the 2015 amendments to the FRCP in a substantive manner. Those that have provide a picture similar to that painted by state court rule changes—i.e., certain of the 2015 FRCP amendments are more readily embraced than others.

In a 2016 case, an Illinois appellate court relied on federal cases interpreting FRCP’s 26(b)(1) proportionality provision because “[t]here is little Illinois case law interpreting [Illinois’] proportionality rule, which was added only two years ago.”<sup>26</sup> The court’s decision is particularly instructive given that Illinois’ proportionality rule uses significantly different language than does FRCP 26(b)(1), most notably in that it identifies no specific factors beyond burden and expense to be considered in making a proportionality determination.<sup>27</sup> The court’s readiness to rely on federal precedent in this circumstance indicates a willingness to adopt the federal judiciary’s approach to proportionality despite different language guiding application of the concept.

State courts may be less willing to rely on federal precedent when it comes to sanctions for ESI spoliation. In a recent New York appellate case addressing spoliation of a video capturing an alleged slip and fall, the New York Supreme Court awarded an adverse inference instruction based on what amounted to negligent failure to preserve the video.<sup>28</sup> Writing in dissent and citing FRCP 37(e), Judge John M. Curran remarked that “federal courts recently ... rejected an adverse inference charge premised on negligent conduct.”<sup>29</sup> As Judge Curran explained:

the federal courts . . . elect[ed] to adopt the reasoning of courts rejecting negligence as a basis for an adverse inference charge . . . and to reject the reasoning of those courts accepting it (*see e.g. Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 108). This rejection of *Residential Funding* may have significant ramifications for New York law because that case . . . is the basis for our appellate courts accepting negligence as a form of a “culpable state of mind” authorizing spoliation.<sup>30</sup>

Even presented with this argument, however, the majority chose not to follow or otherwise endorse the approach taken by the federal judiciary when it comes to appropriate sanctions for loss of ESI.

## DATA AND DISCOVERY STRATEGIES CLIENT ALERT

MARCH 2017

Of course, the approaches taken in seven state courts are not necessarily representative. Other state courts are likely continuing to observe the impact of the FRCP during this early period of application. Whether the 2015 FRCP amendments will have the impact on state courts predicted by some is just another aspect of the amendments that will continue to play out over time.

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1 *See, e.g.*, Ohio R. Civ. Pro. 26 staff note to July 1, 2012, amendment (rule was amended to, *inter alia*, “align Ohio practice with the 2010 amendments to the Federal Rules of Civil Procedure”); Maine R. Civ. Pro. 26 advisory committee note to July 2008 amendment (“These amendments are part of amendments to Rules 16, 26, 33, 34 and 37 to address the discovery of electronically stored information. The amendments are generally taken from the 2006 amendments to the Federal Rules of Civil Procedure governing electronic discovery.”).

The converse is also true. As part of the process of developing the 2015 FRCP amendments, the Advisory Committee considered the approach of and lessons from several state courts that had already undertaken efforts to improve the “just, speedy, and inexpensive” resolution of civil litigation. *See, e.g.*, Comment from Chair of the ACTL Task Force on Discovery and Civil Justice and the Executive Director of the Institute for the Advancement of the American Legal System (IAALS) to Committee on Rules of Practice and Procedure (Rules Committee) (submitted Jan. 28, 2014); Supplemental Comment from Executive Director of IAALS to Rules Committee (submitted Feb. 13, 2014) (both describing civil court pilot projects and rule reform efforts in Colo., Iowa, Mass., Minn., N.H. and Utah).

2 *See, e.g.*, The Sedona Conference, *Int’l Litig. Principles on Discovery, Disclosure & Data Protection in Civil Litig. (Transitional Ed.)*, at 15 n.46 (Jan 2017) (anticipating that “over the next few years, . . . more states [will] conform to the narrower scope of Fed. R. Civ. P. 26(b)(1), and state court judges [will] become open to applying proportionality factors to limit the scope of discovery when properly raised by the parties.”); Jevon Bindman & Michele C. S. Lange, *Impact of the 2015 FRCP Amendments on ediscovery in Minnesota*, Minnesota Lawyer (Jan. 9, 2017) (predicting that Minnesota and “[m]ost of the nation’s states will adopt their own changes reflecting the amended FRCP”); Transcript of Nov. 2013 Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure (Public Hearing), Testimony of John Pierce, on behalf of DRI, at 26 (predicting that there will “be spillover into the state courts”); Transcript of Jan. 2014 Public Hearing, Testimony of Andy Cooke, Flaherty Sensabaugh Bonasso Member, at 323 (predicting that many states “would be informed by the action taken to amend” the FRCP).

3 *See, e.g.*, Jevon Bindman & Michele C. S. Lange, *Impact of the 2015 FRCP Amendments on ediscovery in Minnesota*, Minnesota Lawyer (Jan. 9, 2017) (noting that any changes in Minnesota’s rules would likely be “several years in the future”).

The 2015 FRCP amendments were, themselves, more than five years in the making. *See* Memorandum from Judge David G. Campbell, Chair of Advisory Committee on Federal Rules of Civil Procedure to Judge Jeffrey Sutton, Chair of Rules Committee re: Proposed Amendments to the Federal Rules of Civil Procedure, at 1 (June 14, 2014).

4 Order Amending the Arizona Rules of Civil Procedure and Related Provisions, No. R-16-0010 (Ariz., Sep. 2, 2016), available at <http://www.azcourts.gov/Portals/20/2016%20Rules/R-16-0010.pdf>.

## DATA AND DISCOVERY STRATEGIES CLIENT ALERT

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MARCH 2017

- 5 *Id.* at Attachment A, p.2.
- 6 *Id.* at Attachment A, p.52.
- 7 *Id.* at Attachment A, p.81.
- 8 *Id.* at Attachment A, p.109.
- 9 *Id.* at Attachment A, p.118.
- 10 Colo. R. Civ. P. 1.
- 11 Colo. R. Civ. P. 16 comments to 2015 amendments, ¶18.
- 12 *See, e.g.*, Chief Justice John Roberts, 2016 Year-End Report on the Federal Judiciary (Dec. 31, 2016), at 6, *available at* <http://www.supremecourt.gov/publicinfo/year-end/2016year-endreport.pdf>; Report of the Judicial Conference Rules Committee, Sep. 2014, at 14.
- 13 Colo. R. Civ. P. 26 comments to 2015 amendments, ¶14.
- 14 Colo. R. Civ. P. 26(b)(1).
- 15 Colo. R. Civ. P. 34 comments to 2015 amendments, ¶3.
- 16 *See* Proposed Amendments to Rules 26(b) and 1 of the Massachusetts Rules of Civil Procedure, *available at* <http://www.mass.gov/courts/case-legal-res/rules-of-court/rule-changes-invitations-comment/proposed-amendments-mass-rules-civil-procedure-26b-and-1-2015.html>.
- 17 *See* Mass. R. Civ. Pro. 1 (amended June 29, 2016; effective Aug. 1, 2016).
- 18 Reporter's Notes--2016, at 2, *available at* <http://www.mass.gov/courts/docs/sjc/rule-changes/rule-change-rule-26-mass-rules-civil-procedure-reporters-notes-may-2016.pdf>.
- 19 *Id.*; *see also* Mass. R. Civ. Pro. 26 (amended May 31, 2016; effective July 1, 2016).
- 20 Ohio R. Civ. Pro. 37 staff note to July 1, 2016 amendment.
- 21 *See generally* WSBA, Escalating Cost of Civil Litigation Task Force, *available at* <http://www.wsba.org/Legal-Community/Committees-Boards-and-Other-Groups/Escalating-Cost-of-Civil-Litigation-Task-Force>.
- 22 WSBA Task Force on the Escalating Costs of Civil Litigation Final Report to the Board of Governors, at 28, 34 (Jun. 15, 2015), *available at* [http://www.wsba.org/~media/Files/Legal%20Community/Committees\\_Boards\\_Panels/ECCL%20Task%20Force/Reports/ECCL%20Final%20Report%2006152015.ashx](http://www.wsba.org/~media/Files/Legal%20Community/Committees_Boards_Panels/ECCL%20Task%20Force/Reports/ECCL%20Final%20Report%2006152015.ashx).
- 23 Report of the Board of Governors of the WSBA on the Recommendations of the Escalating Costs of Civil Litigation Task Force (Board Report), at 3 (Jul. 2016), *available at* [http://www.wsba.org/~media/Files/Legal%20Community/Committees\\_Boards\\_Panels/ECCL%20Task%20Force/Reports/BOG%20Response%20to%20ECCL%20Report%20072016.ashx](http://www.wsba.org/~media/Files/Legal%20Community/Committees_Boards_Panels/ECCL%20Task%20Force/Reports/BOG%20Response%20to%20ECCL%20Report%20072016.ashx).
- 24 *See* Cover Letter to Board Report, at 2 (Aug. 17, 2016), *available at* [http://www.wsba.org/~media/Files/Legal%20Community/Committees\\_Boards\\_Panels/ECCL%20Task%20Force/Reports/08-17-16%20Letter%20re%20ECCL%20Recommendations%20FINAL.ashx](http://www.wsba.org/~media/Files/Legal%20Community/Committees_Boards_Panels/ECCL%20Task%20Force/Reports/08-17-16%20Letter%20re%20ECCL%20Recommendations%20FINAL.ashx) ("Ordinarily, the next step would be to convene a rule-drafting group to

## DATA AND DISCOVERY STRATEGIES CLIENT ALERT

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MARCH 2017

prepare and propose civil rule changes to effectuate the accepted recommendations which would then be ultimately forwarded to the [Washington Supreme] Court for consideration.” In this instance, the Board requested the Court’s input before proceeding.).

- 25 In July 2015, Georgia’s Council of Superior Court Judges approved a proposed amendment to the state’s Uniform Superior Court Rules that would add a provision governing spoliation of ESI closely tracking amended FRCP 37(e). See Proposed Amendments to the Uniform Rules of Superior Court (Aug. 3, 2015), available at <https://georgiasuperiorcourts.org/blog/proposed-amendments-to-the-uniform-rules-of-superior-court-5/>; Proposed Amendments to the Uniform Rules For Superior Court, Approved For First Reading (July 29, 2015), at 3, available at <https://georgiasuperiorcourts.org/wp-content/uploads/2015/08/Rules-approved-for-first-reading-at-business-meeting-72915.pdf>. This proposed rule change is not part of the current Georgia Rules, but it is unclear whether the proposal has been considered and rejected or remains pending. See generally Georgia Uniform Superior Court Rules (updated Sep. 22, 2016), available at [http://www.gasupreme.us/wp-content/uploads/2016/09/UNIFORM\\_SUPERIOR\\_COURT\\_RULES\\_Updated\\_09\\_22\\_16\\_.pdf](http://www.gasupreme.us/wp-content/uploads/2016/09/UNIFORM_SUPERIOR_COURT_RULES_Updated_09_22_16_.pdf).
- 26 *Carlson v. Jerousek*, 2016 IL App (2d) 151248, ¶38 n.1 (Ill. App. Ct. 2016).
- 27 Illinois’ “proportionality rule” states that “discovery requests that are disproportionate in terms of burden or expense should be avoided.” Ill. S. Ct. R. 201(a) (eff. July 1, 2014).
- 28 *Sarach v. M&T Bank Corp.*, 34 N.Y.S.3d 303 (N.Y. App. Div. 2016). Although the majority opinion does not overtly designate the failure to preserve as negligent conduct, neither does it refute the dissent’s description of the conduct as such. Compare *id.* at 307 (Curran, J., dissenting) (“the sole basis for the imposition of a penalty is negligent conduct”) with 304-305 (majority opinion) (addressing Judge Curran’s concerns without mention of his characterization of the conduct).
- 29 *Id.* at 308 (Curran, J., dissenting).
- 30 *Id.* (omitting quotations and some internal citations).