

## OAJ Mass Torts Section Article October 2015

### The Federal Rules They Are a-Changin': Entering A New Paradigm of E-Discovery

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Judge Jeffrey Sutton of the Sixth Circuit Court of Appeals is the Chair of Standing Committee on Rules of Practice and Procedure. For the past five years, Judge Sutton and a large team of attorneys and judges have been working on proposed changes to the Federal Rules of Civil Procedure regarding discovery practices in federal court, and specifically with respect to discovery of electronically stored information. Unless Congress rejects the proposed changes through legislation, the new rules will go into effect on December 1, 2015.

On September 4, 2015 I attended a Judicial Round Table in which Judge Sutton, District Court Judge Benita Y. Pearson, and Magistrate Judge James R. Knepp discussed the proposed changes. Below I highlight three of the major changes to the rules and provide some insight gleaned from Judges Sutton, Pearson and Knepp.

Notably, Judge Sutton opened the discussion by saying the “paradigm of American litigation has to change.” He explained that the old model of discovery was “no stone left unturned,” but in the world of ESI, “looking under every stone can get really expensive.”

#### **BIG RULE CHANGE #1: RULE 26(B)(1) – SCOPE OF DISCOVERY**

Rule 26(b)(1) now states:

**(b) Discovery Scope and Limits.**

**(1) 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.

While most of the language in this change was already contained in Rule 26(b)(2), this change is monumental. “Proportionality” now sets the scope of discovery and the “reasonably calculated” language has been omitted altogether.

Judge Sutton explained that “proportionality” really means “reasonableness” and that the factors listed in the new rule are supposed to focus the courts and the parties on what is reasonable in relation to discovery. What was a bit scary is that Judge Sutton summed it up like this – if the admittedly relevant discovery being sought is just too expensive to produce, the answer to the party seeking the discovery might be (and this is a direct quote) “tough luck.”

To deal with this new paradigm, we have to remember there are two totally separate and distinct issues related to discovery of ESI:

- (1) **PRESERVATION.** Defendants have a duty to identify which computers and devices have ESI that is relevant to litigation and to preserve such ESI (this is where spoliation letters are crucial). Defendants may incur some costs in having to (or hiring experts to) physically go to a computer, server, phone, tablet, or whatever the device may be, and plug in a forensic imaging device

(basically a fancy flash drive) in order to “image” or as they say “take a picture of” all the data on each device, thus preserving all the ESI on the device. In reality, this process is not all that expensive, and with today’s technology, enormous amounts of data can be stored for dirt cheap.<sup>1</sup>

- (2) **PRODUCTION.** This includes reviewing the preserved documents for responsiveness and privileged information – and this is where things can get expensive. It might take hundreds or thousands of human hours to do a linear “brute force” review of the preserved documents in order to cull out the responsive documents, while at the same time removing/redacting privileged information. It is at this point that defendants will be able to kick and scream about proportionality.

There are two other changes to Rule 26 that can assist plaintiffs in this new paradigm of proportionality. The first is in the Committee Note to Rule 26. The Note states: “Computer-based methods of searching such information continue to develop, particularly for cases involving large volumes of electronically stored information. Courts and parties should be willing to consider the opportunities for reducing the burden or expense of discovery as reliable means of searching electronically stored information become available.” What the Committee Note is referencing here is predictive coding (or perhaps future technology we don’t even know about yet).

Employing predictive coding significantly reduces the amount of hours it takes for a producing party to review a corpus of documents for responsiveness. It may cost more up front to hire an ESI vendor to do this, but it will save tremendous amounts of time and money in the long run. All predictive coding really means is that an attorney reviews a small sample of documents out of the entire corpus of documents to be reviewed and gives a “thumbs up” or “thumbs down” to each document for responsiveness. The computer then “learns” what the attorney is looking for and after a few iterations of this process, the computer can go find all of the responsive documents with a (fairly, depending on who you talk to) high degree of accuracy. I will admit, I still have my doubts about whether a computer can really find *everything*, but in the face of proportionality arguments, it is either predictive coding – or cost sharing.

Even after predictive coding is employed to find responsive documents, there can nevertheless be a significant amount of documents left that need to be reviewed by the producing party in order to remove/redact privileged information. Another change to the Rule that can be used to assist in defending against proportionality arguments is Rule 26(f)(3)(D). This is the Rule regarding planning for discovery. It has added a specific reference to orders under Rule 502. Rule 502(d) states that:

A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court – in which event the disclosure is also not a waiver in any other federal or state proceeding.

Judge Knepp says he always enters an order under Rule 502 and encourages the parties to rely on predictive coding and not to worry as much about doing long extensive linear reviews of the documents. With an order under 502(d) in place, parties can claw back privileged documents later down the road. Judge Knepp finds that orders under this Rule really help expedite discovery. Not all defendants will agree to this, but at least plaintiffs will be able to tell the court – look, we proposed a discovery protocol (one which has the support of federal judges) which would save the defendants a ton of money, and they refused.

### **BIG RULE CHANGE #2: RULE 34(b)(2)(C) – OBJECTIONS TO REQUESTS FOR PRODUCTION**

Rule 34(b)(2)(C) now states:

(C) *Objections.* An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest.

In the past, some district courts have been critical of the practice of objecting to discovery requests and then producing selected documents, leaving parties “wondering what documents are being produced and what documents are being withheld.” *Athridge v. Aetna Casualty and Surety Co.*, 184 F.R.D. 181, 190 (D.D.C. 1998); *see also Myers v. Goldco, Inc.*, 2008 WL 1995131 (N.D.FL. 2008) (“[T]his kind of equivocal response to discovery leaves the opposing party in the dark as to whether something unidentified has been withheld.”). This Rule change bans that practice.

### **BIG RULE CHANGE #3: RULE 37(e) – DISCOVERY SANCTIONS**

Rule 37(e) now states:

**(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.~~ 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.

This is a HUGE change – and it greatly decreases a plaintiff’s ability to obtain an adverse inference instruction against a defendant for destroying evidence. Per Rule 37(e)(2), we can only get an adverse inference instruction (even a “may infer” instruction) “upon a finding that the party acted with the intent to deprive another party of the information’s use in litigation.” Further, the Committee Note expressly overrules prior case law, like *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002), that allow a district court to give an adverse inference instruction upon a finding of negligent or grossly negligent preservation.

Even worse, the Rule and the Committee Note are completely silent as to which party has the burden of proving intent – or what might constitute prima facie evidence of intent – or even what counts as an intentional act. Does intentional inaction count? Does willful ignorance count? Since companies have document retention policies (aka document destruction policies) in place, and they know documents are being automatically deleted every single day, does the refusal to issue a litigation hold count as an intent to deprive plaintiffs of information? There are lots and lots of questions here.

The silence on the burden of proving “intent” is actually pretty odd since the Committee Note for Rule 37(e)(1) – regarding sanctions “upon finding prejudice to another party from the loss of the information” – states: “The rule does not place a burden of proving or disproving prejudice on one party or the other. Determining the content of lost information may be a difficult task in some cases, and placing the burden of proving prejudice on the party that did

not lose the information may be unfair.” Sheesh, ya think? But the Committee Note leaves practitioners with no guidance whatsoever on the burden of proving intent.

I was involved in a case where the defendant issued a company-wide change to its document retention policy AFTER litigation had begun. Now, instead of employee emails that had been moved to the “trash” folder being permanently stored on the server forever – emails in the “trash” folder would be permanently deleted after 60 days. This resulted in thousands upon thousands of emails that were just sitting in the “trash” folder of various employees – being deleted overnight. Was this an “intentional” act to deprive plaintiffs of information? Or, since this was a company-wide policy change, was it just an “oops”?

Rule 37(e)(2) seems to give defendants a pretty big gift: Whenever evidence is lost, a complete defense will be – “Hey, we’re not evil, we’re just stupid.” With these changes, it is clear that plaintiffs’ attorneys everywhere are going to need to be a lot more aggressive with spoliation letters and discussing preservation issues with opposing counsel.

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<sup>1</sup> There is an extra step involved in getting the data into a reviewable format. A forensic computer analyst is needed to load all the preserved data into a software program (e.g., Forensic Tool Kit) and put all the documents back into their original format so that they can be reviewed by an attorney. This will be an hourly charge – and so the total cost should still be proportional to the volume of data at issue.