Standing Committee Approval of the "Package" of Federal Discovery Amendments[1]

At its May 29, 2014 Meeting in Washington D.C., the Committee on Rules of Practice and Procedure (the "Standing Committee") approved the revised package of amendments recommended by its Advisory Committee on Rules of Civil Procedure (the "Rules Committee").[2] The amendments included significant changes from the original proposals, reflecting considerations which arose as a result of three public hearings involving more than 120 witnesses and over 2300 written comments. The Standing Committee Members were effusive in their praise for the open, transparent process by which the Rules Committee and its two Subcommittees have proceeded since the Duke Conference of 2010.

Among other amendments approved was a new form of Rule 37(e), changes to Rule 1 and a controversial reworking of Rule 26(b)(1). The original multi-layered proposal for a revised Rule 37(e) was scrapped in favor of a simplified rule limited to ESI; an ill-fated attempt to reduce presumptive limits on certain discovery devices was abandoned, and a sharply re-focused Rule 26(b)(1) was approved to emphasize that discovery must be both relevant and proportional to the needs of the case.

The next stop is a review by the Judicial Conference in September. If approved, the Supreme Court will be asked to review and vote on whether to send the amendments to Congress. If that occurs before May, 2015, the individual rules will become effective in December, 2015 unless Congress disapproves.

Scope of Discovery

A core recommendation of the Rules Committee is to move the listed proportionality "factors" from later in Rule 26 into the definition of scope of discovery set out in Rule 26(b)(1). The Rules Committee is convinced that the change "will not limit proportional discovery," but will have an impact only at the margins, where unlimited discovery is inappropriate.

It was explained in response to Standing Committee questions that there is no intent to change the burden of proof involved. As is the practice when a party claims that "undue burden" bars a discovery request, courts will seek the information relevant to the assessment of proportionality from both parties, with the ultimate responsibility to decide whether the request is proportional resting with the court.

However, the Rules Committee has adjusted the order of factors listed in the rule so that "the amount in controversy" is secondary to the importance of "discovery in resolving the issues." The rule will also require consideration of the "relative access" of the parties to the information.

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[2] *See* Report dated May 2, 2014 at 318 *et. seq.* of the Agenda Book for the Meeting, a copy of which is at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2014-05.pdf#pagemode=bookmarks.

A Member asked whether revised Rule 26(b)(1) was intended to guided assessment of what ESI "should have been preserved" under revised Rule 37(e), which is discussed below. The response was that the assessment of whether "reasonable steps" had been undertaken might involve actions taken before a complaint was filed and that under those circumstances, reliance on the common law on the topic was deemed more appropriate.

Cooperation

The Standing Committee also approved the explicit acknowledgment of responsibility by both courts *and* parties for securing the goals of Rule 1 (the "just, speedy, and inexpensive determination of every action") by an amendment to the text. The Committee Note also acknowledges the role of cooperation in the effort, but will clarify that there is no intention to create a right to sanctions for failures to cooperate.

Failure to Preserve

The recommended replacement for Rule 37(e) garnered considerable scrutiny by Members of the Standing Committee during the meeting, given that the revised proposal differs dramatically from the original proposal. Judge David S. Campbell (D. Ariz.) – Chair of the Rules Committee – led a thorough discussion by describing the background to the revised proposal and then dealing with a series of difficult hypotheticals testing the application of the Rule.

The 2010 Duke Conference Panel on e-discovery (full disclosure: the author was a member of that Panel) had recommended that the Rules Committee draft a comprehensive provision spelling out *both* the duty to preserve ESI and the consequences of a failure to do so. However, after a year or more of attempts, the Rules Committee abandoned efforts draft a comprehensive rule on trigger and scope and instead concentrated on the complex task of drafting a rule dealing with consequences of a failure to preserve. In doing so, it accepted as a starting point the common law definition of the duty to preserve.

Thus, the original proposal for Rule 37(e) applied only if information which "should have been preserved in the anticipation or conduct of litigation" was lost. That concept has been retained in revised version, but with the addition that measures are available only when information is lost "because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery." The taking of "reasonable steps" does not mean achieving perfection. As explained by Judge Campbell, the phrase is intended to reject the concept of strict liability because "reasonable conduct is as much as you can ask of people," as is embodied in current Rule 37(e).

The original proposal included a number of imprecise and problematic distinctions dealing with culpability and prejudice and was difficult to apply to losses of tangible property. Many otherwise supportive comments, including those of Lawyers for Civil Justice ("LCJ") suggested the need for changes and clarifications. The revised proposal - see the Appendix - adopted at the April, 2014 Meeting of the Rules Committee based on recommendations of its Discovery Subcommittee focuses only on losses of ESI due to failures to preserve, avoiding many of the difficulties with the original proposal. It is also greatly simplified in its structure in order to emphasize its core provisions.

Under the revised proposal, courts will be authorized (but not compelled) to undertake "measures" in response to failures to preserve ESI under the conditions outlined in the introductory language. Subsection (1) authorizes measures designed to deal with any prejudice involved provided that the measures employed are "no greater than necessary to cure the prejudice." No separate finding of culpable conduct is required since that is dealt with as a preliminary matter in the "reasonable steps" requirement. Appellate review of those decisions will proceed under the normal processes applicable to lower court rulings.

Subsection (2), on the other hand, cabins the authority of a trial court to presume that lost ESI was unfavorable or to instruct a jury that it "may or must" presume that lost ESI was unfavorable or to dismiss an action or enter a default judgment. Those measures may be imposed only upon a finding that "the party acted with the intent to deprive another party" of the use of the ESI in the litigation. This is intended to eliminate the Circuit split caused by decisions like *Residential Funding* (306 F.3d. 99, 108 (2nd Cir. 2002) which authorize adverse inference jury instructions based on mere negligence.

The authority to act in subsection (2) is intended to be in addition to the authority authorized under subsection (1). It is not an alternative. A court cannot take actions which are tantamount to those barred by subsection (2) by simply arguing they are needed to cure prejudice under subsection (1). The requisite intent must be found. This is conveyed by the introductory use of "only" ("only upon a finding that the party acted . . . ") in subsection (2). While the Committee could have separated the two clauses by the use of "but" instead of the current phrase "or,"[3] that could be incorrectly read to imply that Subsection (2) is a subset of (1), which it is not. There is no required showing of prejudice for use of subsection (2) measures.

Why no requirement of prejudice? A finding of elevated intent assumes the existence of prejudice (why else would a party act with that level of intent?) but making it a requirement risks rewarding a party who has destroyed evidence so successfully that it leaves no evidence of its content.

Finally, in response to questions about the permissible form of jury instructions, it was indicated that while a jury may consider arguments of counsel about loss of ESI as part of its deliberations, courts are constrained from instructing on inferences drawn directly from that loss where no finding of specific intent has been made.

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The challenging hypotheticals about Rule 37(e) prompted the observation that the rule could have been drafted in a number of different ways to meet the core objectives. However, Rules Committee believes its recommended version is well within the parameters of the original request for public comments and is a reasonable resolution of the difficult drafting tasks involved. The Standing Committee agreed and unanimously approved it for referral to the Judicial Conference.

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[3] A suggestion made by LCJ in its filing prior to the Standing Committee Meeting. *See* Lawyers for Civil Justice, May 22, 2014, Comment in Support of Proposed Rule 37(e) and the Duke Package of Amendments, copy at http://www.lfcj.com/documents/LCJ%20Comment%20to%20Standing%20Committee%20May%202014.pdf.

APPENDIX

Rule 37(e) FAILURE TO PRESERVE ELECTRONICALLY STORED INFORMATION. (new matter underlined)

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 of 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.