LAWYERS FOR CIVIL JUSTICE

COMMENT
to the
ADVISORY COMMITTEE ON CIVIL RULES

AN EARLY LOOK AT HOW COURTS ARE INTERPRETING AND APPLYING THE 2015 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

April 8, 2016

Lawyers for Civil Justice ("LCJ")[1] respectfully submits this Comment to the Advisory Committee on Civil Rules (the "Committee") in order to provide an early look at how courts are interpreting and applying the amendments to the Federal Rules of Civil Procedure ("FRCP") that took effect December 1, 2015 (the "2015 Amendments"). While some courts' written decisions reflect a serious effort to apply the new language of rules 26(b)(1) and 37(e) in keeping with the Committee's intent, other opinions are based upon interpretations that are inconsistent with the purpose of the amendments as described in the Committee Notes.

The Committee's work in drafting the 2015 Amendments reflected a serious resolve to accomplish the long-sought goal of proportional discovery and to bring a uniform approach to allegations of spoliation of missing ESI. Unfortunately, the early interpretations of those amendments show that, absent further action to educate the bench and bar, the Committee's robust effort—more than five years of work on the part of the Committee and interested stakeholders around the country—may be at risk of suffering the same fate as those that came before. We urge continued and expanded efforts to educate judges and lawyers to ensure that the 2015 Amendments fulfill their intended purpose.

[1] Lawyers for Civil Justice is a national coalition of defense trial lawyer organizations, law firms and corporations that promotes excellence and fairness in the civil justice system to secure the just, speedy and inexpensive determination of civil cases. Since 1987, LCJ has been closely engaged in procedural rule reform in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation.

I. Some Early Interpretations of Amended Rule 26(b)(1) Demonstrate Judicial Reluctance to Embrace a Focused Definition of Relevance and the Proportionality Standard.

A. A Glimmer of Hope: Many Courts Are Applying the New Amendments as Intended.

Examining early decisions involving newly amended Rule 26(b)(1) is important because, as the Committee knows well, courts have not paid sufficient heed to prior attempts to amend the FRCP in order to rein in the breadth of discovery and encourage proportionality.[2] Several written decisions analyze and apply the new language in keeping with the Committee's expressed intentions. For example, in *Sibley v. Choice Hotels*, a court in the Eastern District of New York held:

> The December 2015 amendment to Rule 26 now defines the scope of discovery to consist of information that is relevant to the parties' "claims and defenses." Thus, the discretionary authority to allow discovery of "any matter relevant to the subject matter involved in the action" has been eliminated. Additionally, the current version of Rule 26 defines permissible discovery to consist of information that is, in addition to being relevant "to any party's claim or defense," also "proportional to the needs of the case."[3]

The *Sibley* court also found the omission of "reasonably calculated to lead to the discovery of admissible evidence" to be an improvement in the rule, given that such language had become an "all too familiar, but never correct, iteration of the permissible scope" of discovery.[4] The *Sibley* court further noted that "[u]nfortunately, the 'reasonably calculated' language has often been employed to refer to the actual scope of discovery" and that by "[c]learing up this misinterpretation, the new Rule disposes of this language, ending the incorrect, but widely quoted, misinterpretation of the scope of discovery."[5]

Thoughtful courts also have applied the proportionality factors in a meaningful way.[6] In one example of note, a court in the Middle District of North Carolina in *Raghunathan Sarma v. Wells Fargo*[7] granted a motion to quash a third-party subpoena requiring travel, citing the Advisory Committee Note to Rule 26 to hold that a party propounding discovery should be able to explain

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[2] Lawyers for Civil Justice, *Comment to the Civil Rules Advisory Committee, A Prescription for Stronger Medicine: Narrow the Scope of Discovery* (Sept. 1, 2010), *available at* http://www.lfcj.com/lcj-comments.html.

[3] Sibley v. Choice Hotels, 2015 U.S. Dist. LEXIS 170734, *6 (E.D.N.Y. Dec. 22, 2015) (citing Fed. R. Civ. P. 26(b)(1) and later citing the same rule and its 2015 Advisory Committee Notes for the proposition that the amendment "restores the proportionality factors to their original place in defining the scope of discovery," and "reinforces the Rule 26(g) obligation of the parties to consider these factors in making discovery requests, responses, or objections.").

[4] *Id*. at *7. ("This language was never intended to define the scope of discovery, but was intended only to make clear that the discovery is not limited by the concept of admissibility.").

[5] *Id*. at *8.

[6] *See, e.g., In re* Xarelto Prods., MDL No. 2592, 2016 WL 311762 (E.D. La. Jan. 26, 2016) (requiring individualized showing of proportionality factors); O'Connor v. Uber, No. 13-cv-03826-EMC(DMR), 2016 WL 107461 (N.D. Cal. Jan.11, 2016) (applying proportionality test.).

[7] 2016 U.S. Dist. LEXIS 12048, *16 (M.D.N.C. Feb 2, 2016).

the ways the ways the information sought bears on the issues in the case. Some courts also have heeded the Committee's intention that both parties should address proportionality.[8]

Unfortunately, however, other reported decisions do not reflect the same understanding of the amendments to that rule.

B. Courts Citing *Oppenheimer* for Its Overbroad Definition of "Relevance" Are Circumventing the Promise of Rule 26(b)(1).

An unsettling pattern is already emerging in which courts acknowledge the recent amendments to Rule 26(b)(1), *but nonetheless fail to apply them*. In particular, many courts continue to rely upon the nearly 40-year-old analysis set forth in *Oppenheimer Fund, Inc. v. Sanders*[9] to justify a broad interpretation of relevance, thus perpetuating an inappropriately broad view of the scope of discovery that motivated the Committee to amend the rule to clarify that relevance was to be tested by reference to the claims or defenses themselves.

To understand how inapt *Oppenheimer* is to interpreting the new Rule 26(b)(1), one need only look at the language of the opinion. The question before the Court was whether a request for a defendant to help identify potential class members was properly addressed under the rules of discovery or Rule 23. The Court determined it was the latter. In so deciding, the Court discussed the scope of discovery under Rule 26(b)(1):

> The key phrase in this definition—"relevant to the subject matter involved in the pending action"—has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case. See *Hickman v. Taylor*, 329 U.S. 495, 501, 67 S.Ct. 385, 388, 91 L.Ed. 451 (1947).

Note that the "key phrase" at issue in *Oppenheimer's* analysis was deleted from Rule 26(b)(1) by the 2015 Amendments; relevance to the "subject matter involved in the action" is no longer the test of discoverability. As the Committee explained in the Committee Note, "[p]roportional discovery relevant to any party's claim or defense suffices, given a proper understanding of what is relevant to a claim or defense."

Despite *Oppenheimer's* clear inapplicability, some courts are turning to its antiquated definition of relevance to perpetuate a broad scope of discovery even while acknowledging that the rule has been changed. For example, in the case of *Lightsquared Inc. v. Deere & Co.*, the court *specifically* recognized that "discovery no longer extends to anything related to the 'subject matter' of the litigation," but nonetheless concluded—citing to *Oppenheimer*—that "relevance is still to be 'construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on' any party's claim or defense."[10]

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[8] Wilmington Trust v. AEP Generating Co., No. 2:13-cv-01213, 2016 WL 860693 (S.D. Ohio Mar. 7, 2016) (denying motion to compel where an additional search requested after the "search team" had disbanded would "violate the rule of proportionality").

[9] 437 U.S. 340 (1978).

[10] No. 13 Civ. 8157 (RMB)(JCF), 2015 WL 8675377, at *2 (S.D.N.Y. Dec. 10, 2015).

Similarly, the court in *U.S. ex rel. v. CA, Inc.* acknowledged recent amendments to Rule 26(b)(1) but nonetheless instructed—citing to *Oppenheimer*—that, "[l]ike before, relevance is still to be 'construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on' any party's claim or defense."[11] Application of the *Oppenheimer* analysis to the concept of relevance, absent the adverbial phrase "to the subject matter involved in the pending action," is inappropriate as "relevant" and "relevant to the subject matter involved in the pending action" clearly are not equivalent.

In addition to undermining the goals of the 2015 Amendments, continued reliance upon *Oppenheimer* ignores the significant changes in litigation in the nearly 40 years since the opinion was issued. The Supreme Court, for example, ultimately rejected concerns that computers could be used to hide information that would otherwise be easily accessible, revealing how different the *Oppenheimer* world was from present day. It is almost absurd to think that case law of this line may well undermine the significant efforts of the Committee to reform discovery via the 2015 Amendments.

C. Slow-To-Adopt Courts Are Still Applying the Deleted "Reasonably Calculated" Standard.

Some post-December 1, 2015 decisions refer incorrectly to the legal standard of pre-existing Rule 26(b)(1) by quoting the deleted "reasonably calculated" language.[12] For example, in *Ghorbanian v. Guardian Life*, the court held that "[d]iscovery of matter 'not reasonably calculated to lead to the discovery of admissible evidence' is not within the scope of Rule 26(b)(1)."[13]

Even more worrisome, however, the "reasonably calculated" language is being employed even in cases acknowledging the amended Rule 26(b)(1). For example, a court in the District of Maryland has stated that "[i]nformation sought need only 'appear [] [to be] reasonably calculated to lead to the discovery of admissible evidence' to pass muster."[14] In *Dixon v. Williams*, the court cited to the amended Rule 26(b)(1), but then held that "[d]iscovery is generally permitted of any items that are relevant or may lead to the discovery of relevant information."[15] The court

[11] No. 09-1600-ESH, 2016 WL 74394, at *7 (D.D.C. Jan. 6, 2016); *see also, e.g.*, Wit v. United Behavioral Health, No. 14-cv-02346-JCS, Related Case No. 14-cv-05337 JCS, 2016 WL 258604, at *10 (N.D. Cal. Jan. 21, 2016) (citing *Oppenheimer Fund* for the proposition that "[t]raditionally the relevance requirement of Rule 26(b)(1) has been construed broadly" despite acknowledging *Oppenheimer Fund's* focus on "language contained in Rule 26 prior to 2015 amendments.")

[12] Ghorbanian v. Guardian Life Ins. Co. of Am., No. C14-1396RSM, 2016 WL 1077251, at *2 (W.D. Wash. Mar. 18, 2016) ("Discovery of matter 'not reasonably calculated to lead to the discovery of admissible evidence' is not within the scope of Rule 26(b)(1)); Trans Energy v. EQT Production Co., 2016 U.S. Dist. LEXIS 10530 (N.D. W.Va. Jan. 29, 2016) ("Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." citing *Fed. R. Civ. P. 26(b)(1),* but noting December 1, 2015 amendments.); Torcasio v. New Canaan, No. 3:15CV00053(AWT), 2016 WL 299009 (D. Conn. Jan. 25, 2016) (correctly citing the new rule, in one instance, but inexplicably ordering response to an interrogatory because it "could well lead to admissible evidence.").

[13] 2016 WL 1077251, at *2.

[14] Fid. & Guar. Life Ins. Co. v. United Advisory Grp., Inc., 2016 U.S. Dist. LEXIS 18773, (D. Md. Feb. 17, 2016) (citing case referring to "reasonably calculated" but then, inserting "proportionality" requirement into the amount and content of the discovery sought.).

[15] No. 4:13-CV-02762, 2016 WL 631356, at *1 (E.D. Pa. Feb. 17, 2016).

justified this conclusion by citing to a number of cases that pre-date the 2015 Amendments. Similarly, in *Vailes v. Rapides Parish Sch. Bd.*, the court noted that "the relevancy of a discovery request depends on whether it is 'reasonably calculated' to lead to admissible evidence."[16] These cases reflect how deeply ingrained "reasonably calculated" has become in the culture of discovery disputes—which is particularly unfortunate because, as the Advisory Committee has noted, the "reasonably calculated" language was never a correct or permissible definition of the scope of discovery.

II. Circumvention of Rule 37(e) Poses a Grave Risk of Failure to Create a Uniform Standard.

In some cases involving alleged spoliation of ESI, courts are ignoring amended Rule 37(e)[17] or refusing to apply it to ongoing disputes, because, in their view, it is preferable to apply the old rules[18] or because parties have not raised the issue.[19] These issues will presumably be mitigated over time as courts and parties accept their responsibilities under the new Rule.

In other decisions, courts are applying their inherent powers to losses of ESI rather than the rule, because it "has not been decided" if a court is precluded by the existence of Rule 37(e) from doing so.[20] This incorrect conclusion involves a serious risk of undermining the ability to provide a uniform standard to achieve the Committee's goals.

A. Courts' Reliance on "Inherent Authority" Ignores New Rule.

Despite the Committee's clear statement that the new Rule 37(e) "forecloses reliance on inherent authority or state law to determine when certain measures should be used,"[21] some courts are employing "inherent authority" to impose sanctions for conduct related to spoliation.[22]

The Committee's power to displace inherent authority by targeted rulemaking (approved by the Supreme Court and Congress) was made clear in *Chambers v. NASCO, Inc.*.[23] After noting that "[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion,"[24] the Court stated that "the exercise of the inherent power of lower federal courts can be limited by statute and rule . . . ."[25] The Court followed that declaration with several passages

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[16] Civil Action No.: 15-429, 2016 WL 744559, at *2 (W.D. La. Feb. 22, 2016).
[17] Carter v. Butts Cty., No. 5:12-CV-209 (LJA), 2016 WL 1274557, at *8 (M.D. Ga. Mar. 31, 2016) (assessing loss of digital photos under existing Circuit principles).
[18] Mcintosh v. U.S., No. 14-CV-7889 (KMK), 2016 WL 1274585, at *32 (S.D.N.Y. Mar. 31, 2016) (applying the "familiar law of *Residential Funding* and its progeny").
[19] Thurmond v. Bowman, No. 14-CV-6465W, 2016 WL 1295957, at *8 n. 6 (W.D.N.Y. Mar. 31, 2016) ("neither party has advocated for the retroactive application of the current version of Rule 37").
[20] Intermatch, Inc. v. Nxtbigthing, LLC, No. 14-cv-05438-JST, 2016 WL 491483, at*4 n. 6 (N.D. Cal. Feb. 8, 2016).
[21] FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendment.
[22] *See, e.g.*, CAT 3, LLC v. Black Lineage, Inc., No. 14 Civ. 5511 (AT) (JCF), 2016 WL 154116 (S.D.N.Y. Jan. 12, 2016).
[23] 501 U.S. 32 (1991).
[24] *Id*. at 44.
[25] *Id*. at 47.

that leave no doubt that clearly expressed intent to preclude should be honored and applied by the lower courts.[26]

In the case of Rule 37(e), the intent to "foreclose reliance on inherent authority" was clearly and consistently expressed by the Committee throughout the four-year process leading to the adoption of Rule 37(e) by the Judicial Conference, the Court and the Congress. In April 2011, the Discovery Subcommittee set forth several possible versions for a revised Rule 37 and, addressing a version that would preclude a court from imposing sanctions when a party had complied with Rule 26.1, commented in footnote that:

> [I]ncluding a provision like this could obviate reliance on "inherent authority" to support sanctions like those listed in Rule 37 (b) in cases in which failure to preserve did not violate any court order. A Committee Note could presumably say something like: "Given the introduction of a specific basis in Rule 37 for imposition of sanctions, and specific provisions in Rule 26.1 regarding the scope of the preservation duty, there should no longer be occasion for courts to rely on inherent authority to support sanctions in cases in which a party has failed to preserve discoverable information."[27]

The Minutes of the Committee's November 2, 2012 meeting repeated the Committee's determination to displace inherent authority:

> Present Rule 37(e) is limited to regulating sanctions "under these rules." That limit is discarded in the proposal. The purpose is to make it unnecessary to resort to inherent authority. There is a lot of loose language in the cases about inherent authority. (e)(2)(A), requiring substantial prejudice and bad faith or willfulness, encompasses all the circumstances in which it would be appropriate to rely on inherent authority.[28]

The Committee's April 2013 Agenda Book contains similar language,[29] and the Discovery Subcommittee Report regarding Rule 37(e) in the Agenda Book for the April 2014 Committee

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[26] *Id.* at 48 (citing to "the Advisory Committee's Notes on the 1983 Amendment to Rule 11" for the proposition that Rule 11 did not limit the court's inherent power), at 49 n.13 (the same Notes contain "no indication of an intent to displace the inherent power"), and at 49 ("a clearer expression of purpose" in a Rule could be read by the Court to "abrogate [the] well acknowledged proposition" that a court can employ its inherent power to dismiss a case for lack of prosecution). *Cf. Id.* at 50 ("But if in the informed discretion of the court, neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power.")

[27] Advisory Committee on Rules of Civil Procedure, *Agenda Materials, Austin, TX, April 4-5, 2011*, p. 207 n. 37, *available at* http://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-civil-procedure-april-2011.

[28] Advisory Committee on Rules of Civil Procedure, Meeting Minutes, Nov. 2, 2012, at 5, *available at* http://www.uscourts.gov/rules-policies/archives/meeting-minutes/advisory-committee-rules-civil-procedure-november-2012.

[29] Advisory Committee on Rules of Civil Procedure, *Agenda Materials, Norman, OK, April 11-12, 2013*, p. 177, *available at* http://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-civil-procedure-april-2013; *see also, Id.* at 187 (setting forth a Draft Committee Note stating that the proposed amended rule "makes unnecessary resort to inherent authority.")

meeting stated that: "The proposed rule, moreover, supersedes reliance on inherent power to adopt measures it does not authorize."[30]

The Note to the final rule conclusively states: "New Rule 37(e) . . . therefore forecloses reliance on inherent authority or state law to determine when certain measures should be used." Any use of the inherent authority to impose measures of the sort authorized by Rule 37(e) thus flies in the face of the Committee's consistently expressed intent to supersede it by rule.[31]

B. The Use of Other FRCP Provisions To Support Sanctions Undercuts the Purpose and Effectiveness of New Rule 37(e).

The purpose of Rule 37(e) is to provide clear and comprehensive standards for courts handling failures to preserve ESI. Rule 37(e) is intended to "occupy the field" for handling losses of ESI even when other subsections of Rule 37 are invoked as authority to act but provide tests which are inconsistent or conflict.[32]

1. Sanctions Under Rule 37(b) for Violation of Preservation Obligations Are Inappropriate Because Rule 37(e) Is Meant To Occupy the Field.

Rule 37(b) provides sanctions for failures to "provide or permit" discovery in violation of court orders, including those dealing with preservation. Courts applying Rule 37(b) typically do not require a showing of culpability for its listed sanctions, let alone the "intent to deprive" standard required under Rule 37(e). If Rule 37(b) is asserted as the basis for a violation of a duty to preserve ESI, it is Rule 37(e) that should govern the choice of measures given the conflict in provisions. The court in *HM Electronics v. R.F. Technologies* overstated the matter when it opined that the absence of a discussion of the overlap in the Rule 37(e) Committee Note meant that there was no reason to believe that Rule 37(e) bars use of Rule 37(b) for sanctions for failures to preserve ESI under those circumstances.[33]

The same is true of reliance on Rule 37(c), which provides measures for failures to provide initial disclosures required by Rule 26(a) and for the failure to timely supplement them under Rule 26(e). As is the case of Rule 37(b), use of sanctions under Rule 37(c) requires no finding of heightened culpability such as is required under Rule 37(e).[34] In *Benefield v. MStreet Entertainment*, however, the court used the lesser culpability standards of Rule 37(c) to authorize a spoliation instruction for loss of ESI while ignoring Rule 37(e).[35] The court held that it was

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[30] Advisory Committee on Rules of Civil Procedure, *Agenda Materials, Portland, OR, April 10-11, 2014*, p. 382, *available a*t http://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-civil-procedure-april-2014.

[31] FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendment.

[32] Although a slightly different context, the "preemption" of state action is implied when federal law so thoroughly occupies a legislative field as to make it reasonable to draw that inference. Montalvo v. Spirit Airlines, 508 F.3d 464, 470 (9th Cir. 2007).

[33] HM Elecs., Inc. v. R.F. Techs., Inc., no. 12cv2884-BAS-MDD, 2015 WL 4714908, at *30 (S.D. Cal. Aug. 7, 2015) *vacating sanctions as moot,* No. 12-cv-2884-BAS-MDD, 2016 WL 1267385 (S.D. Cal. 2016).

[34] Sun River Energy v. Nelson, 800 F.3d 1219, 1227 (10th Cir. Sept. 2, 2015) ("Rule 37(c)(1) by its terms does not require a showing of bad faith").

[35] Benefield v. MStreeet Entm't, LLC, No. 3:13-cv-1000, 2016 WL 374578, at *6 (M.D. Tenn. Feb. 1, 2016).

sufficient that deleted text messages "might contain relevant to the subject matter at issue" and the failure to preserve could not be "justified."

The correct approach to resolving an apparent conflict between Rule 37(e) and other subsections is best illustrated by *Marquette Transportation v. Chembulk,*[36] where a court applying Rule 37(c) denied sanctions based on the provisions of Rule 37(e) because "the full data contained on the VDR was discovered and produced."[37]

2. Sanctions Under Rule 26(g)(3) Relating to Loss of ESI Are Inappropriate Because Rule 37(e) Is Meant To Occupy the Field.

Rule 26(g)(3) authorizes sanctions against parties and their counsel who "certify" discovery responses in violation of the provisions of the rule. Some courts have held that a failure to disclose known destruction of otherwise discoverable information in discovery filings may, under some extreme conditions, be considered as a violation of that rule.[38]

If that logic is sought to be employed, Rule 37(e) should form the basis for assessing the conduct and determining the measures available for the same reasons stated above in regard to Rules 37(b) and (c). The case law under Rule 26(g)(3) does not require the same level of preconditions nor culpability restrictions and it would undercut the intent of the Supreme Court rule in Rule 37(e) in the same ways as described above in regard to other provisions of Rule 37.

C. Admitting Evidence of Spoliation Despite a Lack of Prejudice or an "Intent to Deprive" Eviscerates New Rule 37(e).

The Committee Note states that subdivision (e)(1) permits the admission of evidence showing a failure to preserve ESI, and allows a related jury instruction, provided that such a remedy is "no greater than necessary to cure the prejudice." Disturbingly, however, some courts have misinterpreted the fact that no "intent to deprive" is required for such a measure to be a license to punish without any regard to whether the measure will cure any prejudice. For example, in *Nuvasive, Inc. v. Madsen Medical, Inc.,* the court stated it would admit evidence of spoliation as a method of providing "recourse" for the moving party even though the court was "not convinced there was any prejudice."[39]

A similar misinterpretation appears to have been present in *Ericksen v. Kaplan Higher Education,* where the court not only precluded use of certain evidence in order to address prejudice but also took the additional step—without further explanation—of permitting admission of evidence related to the loss of evidence at trial.[40]

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[36] Marquette Transp. Co. v. Chembulk Westport M/V, No. 13-6216 c/w 14-2071, 2016 WL 930946 (E.D. La. Mar. 11, 2016).
[37] *Id*. at *3.
[38] Grady v. Brodersen, No. 13-cv-00752-REB-NYW, 2015 WL 1384371, at *4 (D. Colo. Mar. 23, 2015) (finding that party violated Rule 26(g) by not specifying in his Rule 26(a)(1) disclosures that he had destroyed a computer).
[39] No. 13cv2077 BTM(RBB), 2016 WL 305096, at *3 (S.D. Cal. Jan. 26, 2016) (reversing earlier decision to authorize adverse inference because there was no intent to deprive).
[40] Ericksen v. Kaplan Higher Educ., LLC, No. RDB-14-3106, 2016 WL 695789, at *2 (D. Md. Feb. 2, 2016).

In neither case did the evidence appear to support a finding of "intent to deprive" under Rule 37(e)(2), but the result risks undercutting the prospects of parties in litigation in ways which "may tip the balance in ways the lost evidence never would have."[41] "Once a jury is informed that evidence has been destroyed, the jury's perception of the spoliator may be unalterably changed."[42] Introduction of such evidence and argument under such circumstances—allowing a jury to make adverse inferences under circumstances barred by the rule—undermines the uniformity sought by Rule 37(e)(2) by the "intent to deprive" standard. This practice will impose a "heavy penalty for losses" of ESI, creating "powerful incentives to over-preserve, often at great cost."[43]

Conclusion

Although some courts are applying Rules 26(b)(1) and 37(e) of the 2015 Amendments as intended, the early reported decisions show that other courts have ignored the rules, relied on deleted language or inapplicable case law, or applied rudderless interpretations. Such decisions allow the *status quo ante* to thrive as if nothing has changed and thus are creating a high risk that the Committee's determined efforts to reduce the epidemic of over-discovery and over-preservation could be in jeopardy. Continued and expanded efforts to educate judges and lawyers are strongly needed to ensure that the 2015 Amendments succeed.

[41] FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendment.
[42] GORELICK ET AL., DESTRUCTION OF EVIDENCE §. 2.4 (2014).
[43] June 2014 RULES REPORT, at III (E).