The Federal Rules of Civil Procedure as They Relate to E-Discovery

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2006 Amendments Relating to E-Discovery

- **Rule 26(a)(1) (ii)** Initial Disclosures. A party must provide a copy of, or description by category and location of ESI in the Possession, Custody or Control of the party and that the party may use to supports its claims or defenses.

2006 Rule 26(f)

- Parties must meet and confer and develop a discovery plan which must state the parties' views and proposals concerning:
- "any issues relating to disclosure or discovery of ESI, including the form of forms in which it should be produced" AND" any issues relating to claims of privilege or protection as trial prep materials" (now covered under FRE 502)

2006 Rule 26(b)(2)(B)

- "Specific Limitation on ESI" "A party need not provide discovery of ESI from sources that the party identifies as not reasonably accessible (NRA) because of undue burden or cost. If the producing party shows that the information is NRA the court may nonetheless order discovery from such sources if requesting party shows good cause (i.e. balances cost v. benefit). The court may specify conditions (i.e. cost shifting) for the discovery.

2006 Rule 33(d)

- Option to Produce Business Records. Where an answer to an interrogatory may be derived from a party's business records, **including ESI,** and the burden of extracting the information is the same for both parties, the producing party may specify the records from which the answer may be derived and permit the requesting party a reasonable opportunity to examine the records.

2015 Rule 26(b)(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.

2015 Rule 37(e)

37(e) **FAILURE TO PRESERVE ELECTRONICALLY STORED INFORMATION**. 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.

Reflections on Rule 37(e)

- Applies only to the loss of ESI, not to hard-copy or tangible things
- Defers to common law on the trigger and the scope of a party's preservation obligations
- Applies only if a party "failed to take reasonable steps to preserve" ESI
- Applies only when lost ESI "cannot be restored or replaced through additional discovery"

Reflections on Rule 37(e) (Cont'd)

- Does not use the words "sanction" or "spoliation"
- Requires a finding of prejudice unless there is an "intent to deprive another party of the information's use" in litigation
- Limits curative measures to those "no greater than necessary to cure the prejudice" (*e.g.*, additional discovery, fines, cost shifting, evidence preclusion, and allowing parties to present evidence or argument to jury regarding the loss)

Open Issues With Respect to Rule 37(e)

- Reasonable Steps. The phrase "lost because a party failed to take reasonable steps to preserve" is ambiguous. Different arbitrators may have different views on what steps are "reasonable"
- Burden of Proof. Under both subsections (1) and (2), the new rule is silent as to burden of proof. Does the party claiming prejudice have to establish its existence, or does the spoliating party have to prove lack of prejudice? Likewise, does intent to deprive need to be proven by the aggrieved party or disproven by the spoliating party?

What Factors Might an Arbitrator Consider in Deciding Whether to Impose Sanctions?

- Whether the party was on notice that litigation was likely and that the ESI would be discoverable
- Whether the party received a request to preserve, the clarity and reasonableness of the request, and whether the requestor and recipient engaged in good faith consultation regarding the scope of preservation
- Good faith adherence to neutral policies and procedures (*i.e.*, routine operation of an electronic information system
- The reasonableness of the party's efforts to preserve, including the implementation of a litigation hold and the scope of the preservation efforts
- The proportionality of the preservation efforts to any anticipated or ongoing litigation. ("A party may act reasonably by choosing the least costly form of information preservation. . . .")

What Factors Might an Arbitrator Consider in Deciding Whether to Impose Sanctions?

- Whether the information not retained reasonably appeared to be cumulative or duplicative
- The party's resources and sophistication, including whether the party "has a realistic ability to control or preserve some ESI"
- Factors outside the party's control (*e.g.*, "acts of God," cloud computing disasters)
- Adherence to best practices standards and guidelines (*e.g.*, *The Sedona Conference® Commentary on Legal Holds: The Trigger and the Process (2010)*