Arkansas Association of Defense Counsel

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The Rules, They Are A Changin': Part 2

By Quenten Whiteside

Last week's article brought you up to speed on the changes to Federal Rules of Civil Procedure focused on modifications to summonses, scheduling conferences, and requests for production. This week we explore the rule changes in regards to discovery, specifically changes to preservation of Electronically-Stored Information ("ESI") and proportionality as defining the scope of permissible discovery.

ESI is anything stored electronically such as emails, Portable Document Format (PDF), Word documents, Excel documents, JPEGS (photos), and other such formats. The production of ESI has become standard practice in litigation, causing the costs and burdens of discovery to skyrocket. Recognizing the way that ESI has changed discovery, the Supreme Court of the United States implemented changes to the rules as part of its ongoing attempt to foster quick and cost-efficient litigation.

Rule 37(e). The modifications to this rule provide courts with the discretion to remedy lost ESI. Rule 37(f) was implemented in 2006 to impose a good-faith standard to ensure a party was not exploiting the routine operation of destroying files to avoid their obligation to preserve ESI in anticipation of litigation. Fed. R. Civ. P. 37(f) (2006 Addition to Advisory Committee Notes). Under the current rule, "absent exceptional circumstances," the court could not impose sanctions on a party failing to provide ESI. Fed. R. Civ. P. 37(e).

This rule did not address the problems posed by "exponential growth in the volume of such information." Fed. R. Civ. P. 37(e) (2015 Addition to Advisory Committee Notes). That omission led federal circuits to establish different standards for imposing sanctions and "caused litigants to expend excessive effort and money on preservation in order to avoid risk of severe sanctions" if the court found they did not do enough. *Id.*

To address this problem, the new rule requires "reasonable steps," not perfection, to preserve ESI. *Id.* If ESI should have been preserved in anticipation of litigation but was lost, the court "may order measures no greater than necessary to cure the prejudice." *Id.* A court "may need to decide whether and when a duty to preserve arose." *Id.* Considerations are given to the party's resources, sophistication, and proportionality of the efforts to preserve. *Id.*

In a larger effort to enforce these rules, if the court finds the party acted with "intent to deprive" the other party of the information's use in litigation, it may presume the information was unfavorable, instruct the jury that it may or must presume the information was unfavorable, or dismiss the action or enter a default judgment. *Id.* These severe measures should not be used if the information was

superfluous or other measures could be used to compensate the other party. *Id.*

Rule 26(b)(1). The rule is being modified to emphasize the limitation of proportionality on discovery. The Court will strike the current language of Rule 26(b)(1) providing that "the court may order discovery of any relevant subject matter involved in the action" and "relevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1) (2015 Addition to Advisory Committee Notes).

This change to the rule highlights the fact the information is discoverable if it is both "relevant to any party's claim or defense" and "proportional to the needs of the case." *Id*. Proportionality considers the "importance of the issues at stake, amount in controversy, parties' access to relevant information, the parties' resources, the importance of discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." *Id.* With the exception of the relative access to relevant information consideration, these factors appeared in the previous version of Rule 26 as factors limiting frequency and extent of discovery. The amendment ensures that these factors are given primary consideration in the scope of permissible discovery.

These articles present only a brief discussion of all the rule changes but we hope they have made you aware that the rules, they are a changin'.

The thanks of the AADC go out to Quenten Whitside of Wright Lindsey & Jennings for drafting this article.

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