A Legal Perspective

Proposed New Federal Civil Rules – Part One (Data Disposition & Sanctions)

By: Anne Kershaw, Esq.

The Federal Rules of Civil Procedure ("FRCP") contain the rules pertaining to discovery in federal litigation that drive most lawyer behavior in the land of e-discovery – and the rules are a 'changing! This article, the first of a three-part series, will address the potential effects of the FRCP 37 proposed sanctions amendments on records management and e-discovery practices.

Background

On August 15, 2013, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (the Standing Committee) published for public comment a number of proposed amendments to the FRCP recommended by the Advisory Committee on Civil Rules. The Standing Committee and Advisory Committees include law school professors and deans, a few practitioners, and federal District Court and Appellate Court judges. (Click here to review the proposed FRCP amendments and for the list of members on both Committees) The public comment period closes on February 15, 2014.

Based on comments from the bench, bar, and general public, the Advisory Committee may choose to discard, revise, or transmit the amendments as drafted to the Standing Committee. The Standing Committee independently reviews the final findings of the Advisory Committee and, if satisfied, recommends changes to the Judicial Conference, which in turn recommends changes to the Supreme Court. Any new amendments that emerge at the end of this process would be effective on December 1, 2015. While that might sound like a long time, there is much that can be done over the next two years to prepare for certain amendments relating to document and data disposition that appear likely pass through the amendment process.

According to the Advisory Committee Reports included in the published proposed amendments, committee members urged the need for increased cooperation among litigants, proportionality in using the discovery rules, and early, active judicial case management. Significant changes to FRCP 37 (Failure to Make Disclosures or to Cooperate in Discovery; Sanctions) regarding sanctions for spoliation were also strongly urged. The proposed amendments certainly seek to accomplish all of these goals with proposed changes to Rules 1, 4, 16, 26, 30, 31, 33, 34, 36, and 37.

Since the new proposed FRCP 37 would require a showing of willful or bad faith spoliation before sanctions can be imposed, "save everything" strategies must quickly be replaced with policies requiring disposal of records in accordance with a systematic disposition review process. This is because any disposal in a "save everything" environment could be seen as being "willful." Disposing of records as part of a "routine disposition" process, on the other hand, is done in the ordinary course of business and is by definition not willful. The proposed amendments also

require courts to look into all possible measures to remediate any alleged spoliation before imposing sanctions. In addition, the proposed Rule 37 amendments contain provisions in tandem with other proposed amendments that will drive the parties to reach agreement very early in a case regarding the scope of preservation. This will also help eliminate "save everything, just in case" practices with respect to preservation for litigation. Overall, the proposed amendments should help the legal profession move from thinking about discovery and information as thousands of pages of documents in emails and file shares to a more modern approach that instead thinks about information as knowledge that may be captured, retained and shared in any number of ways.

Proposed Amendments to Rule 37

We are all painfully aware of situations where an organization has an appropriate records management policy in place requiring records disposal, but the lawyers insist that everything must be saved out of fear that a court might levy sanctions for spoliation if information relevant to a lawsuit or investigation is inadvertently disposed of. The lawyer's fears are not without basis in that there have been decisions holding that the negligent failure to preserve relevant information is subject to sanctions. See e.g. Residential Funding Corp. v. DeGeorge Fin. Corp, 306 F.3d 99, 101 (2d Cir. 2002) (reversing the district court's denial of an adverse-inference jury instruction for the appellee's failure to produce emails in time for trial and holding that "discovery sanctions, including an adverse inference instruction, may be imposed where a party has breached a discovery obligation not only through bad faith or gross negligence, but also through ordinary negligence").

The Advisory Committee, however, appears to understand the significant problems associated with a "save everything" approach. The retention of massive amounts of unstructured information inflates e-discovery costs to astronomical proportions and makes it increasing more difficult to find the relevant information that we seek.

The FRCP discovery rules were last amended in 2006 and concerns about the increasing burdens of over-preservation were discussed and addressed then with an amendment to FRCP 37(e) which provides that:

> (e) Failure to Provide 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.

This is the current FRCP 37(e) rule and, not surprisingly, it has done nothing to alleviate lawyers' continuing fear of sanctions regardless of how thoughtful and reasonable their judgments are as to how best to locate relevant information. The "save everything, just in case" over-preservation approach has, unfortunately, continued unabated.

After considering various approaches, all of which were vetted at a conference held in September 2011, the Discovery Subcommittee of the Advisory Committee decided to focus on an approach to revising the rules that would make the most serious sanctions unavailable if the party losing the information acted reasonably. As stated in the May 8, 2013 Report of the Advisory Committee (as supplemented in June 2013), such a rule could "be seen as offering 'carrots' to those who act reasonably, rather than relying mainly on 'sticks,"' as a sanction regime might be seen to do."

Accordingly, under the new proposed FRCP 37, ***"in all but very exceptional cases in which failure to preserve "irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation" – sanctions (as opposed to curative measures) could be employed only if the court finds that the failure to***

preserve was willful or in bad faith, and that it caused substantial prejudice in the litigation." (Emphasis added) In other words, apart from a situation involving the loss of an essential piece of evidence (such as the vehicle that was involved in the accident), culpability significantly more than negligence, i.e. willfulness or bad faith, would be needed before sanctions can be imposed. Even then, sanctions may be imposed only if no alternative curative measure is available to remedy the loss (resulting in substantial prejudice the aggrieved party).

Equally significant – and perhaps most impactful for records management – is the list of considerations set out in the prosed new FRCP 37 (e) that a court should take into account in making a determination as to whether a party acted reasonably versus in bad faith. As stated in FRCP 37(e)(2)**:**

> These factors guide the court when asked to adopt measures under Rule 37(e)(1)(A) due to loss of information or to impose sanctions under Rule 37 (e)(1)(B). The listing of factors is not exclusive; other considerations may bear on these decisions, such as whether the information not retained reasonably appeared to be cumulative with materials that were retained. With regard to all these matters, the court's focus should be on the reasonableness of the parties' conduct.

The first factor listed for consideration in 37(e)(2) is the extent to which the party was on notice that (a) litigation was likely; and (b) the lost information would be discoverable in that litigation.

The second factor looks to the party's preservation efforts once it knew of the litigation prospect. The Comments to proposed FRCP 37(e)(2) state: "The party's issuance of a litigation hold is often important on this point. But it is only one consideration, and no specific feature of the litigation hold -- for example, a written rather than an oral hold notice -- is dispositive. Instead, the scope and content of the party's overall preservation efforts should be scrutinized." In this regard, the court is instructed to consider the party's relative sophistication (or not) with respect to litigation and what the party knew, or should have known, regarding the possibility that information could be lost if active preservation steps were not taken.

Significantly, the Comments to the proposed amendment state: *"The fact that some information was lost does not itself prove that the efforts to preserve were not reasonable."* (Emphasis added). This could have a huge, positive affect on organizations deciding to implement and follow a routine disposition process since it appears that inadvertent or negligent deletion would not give rise to spoliation sanctions.

The third factor asks whether the party received a request to preserve information and an important consideration is whether the party making the preservation request is willing to engage in good faith consultation about the scope of the desired preservation.

The fourth factor focuses "on the information needs of the litigation at hand," which emphasizes the overall concern of the proposed amendments--proportionality. In this regard, the court is instructed to:

> "[B]e sensitive to party resources; aggressive preservation efforts can be extremely costly, and parties (including governmental parties) may have limited resources to devote to those efforts. A party may act reasonably by choosing the least costly form of information preservation, if it is substantially as effective as more costly forms. It is important that counsel become familiar with their clients' information systems and digital data -- including social media -- to address these issues."

Finally -- and this last factor would be

tremendously helpful if enacted -- the court must consider whether the party that allegedly failed to preserve sought guidance from the court after trying to reach agreement on the scope of preservation with the other parties. This provision should push lawyers to work harder to agree or litigate the scope of preservation very early in the case; failing to do so will significantly undermine any later sanction motion that might arise. Further driving the parties to reach agreement on the scope of preservation are proposed amendments to Rule 26(f)(3), directing the parties to address preservation in their discovery plan, and amendments to Rule 16(c)(3) inviting provisions on this subject in the scheduling order.

So far, the general feedback on the proposed amendments has been positive. It looks likely that at least the willful or bad faith culpability standards for sanctions will be enacted, as well as leniency for parties that seek to obtain agreement or judicial guidance regarding the scope of preservation. If the willful/bad faith standard is enacted, organizations will have every reason to make sure that they routinely dispose of documents that do not need to be retained. Indeed, not doing so would present significant risks as any non-routine disposition could arguably be viewed as willful.

Accordingly, organizations would be well-advised to review and dispose of eligible accumulated legacy records now and obtain expert opinions confirming that they fall outside any current preservation obligations (if possible). If the proposed amendments incorporate the benefits described above for seeking early agreements or a ruling as to the scope of preservation, lawyers - especially those representing plaintiffs - will be motivated to discuss and negotiate the scope of preservation with adversaries as soon as possible.

To do this well, lawyers will need to have a good understanding of their client's records management and disposition policies and work quickly to identify and collect relevant documents to use in framing the negotiations. Lawyers and courts will also need to work harder under the proposed amendments to identify alternate sources for information. All of this gives added value to the role of records managers and helps organizations begin to embrace the emerging professional role of records managers within "knowledge services" functions, as part of an overall "Knowledge Strategy" for the organization. (Stay tuned for the upcoming March 2014 Newsletter article on Columbia University's Master of Science in Information and Knowledge Strategy, http://ce.columbia.edu/information-and-knowledge-strategy).

Additionally, engaging in early discussions with adversaries about what we have and what we know without fear of "gotcha" sanctions motions means that we can finally replace preservation uncertainty – the reason why organizations save everything – with preservation certainty. Instead of trying to chase and corral thousands of documents, and worrying about what we might not know we have, we can instead start employing strategies to effectively meet discovery obligations within the larger context of managing our knowledge assets. Thankfully, the proposed amendments go a long way in helping lawyers and judges embrace this change.

The second article in this series will discuss the proposed amendments relating to case management, cooperation and proportionality and the third will explore the public comments submitted in response to the proposed amendments by various stakeholders.

About the Author

Anne Kershaw, Esq., is an attorney and expert in legacy data management, and has authored numerous articles on electronic discovery. She consults with organizations on completing the life cycle for unneeded paper documents and electronic files and data. She is the founder of Knowledge Strategy Solutions™ and A. Kershaw P.C. // Attorneys & Consultants.

She is also the co-founder and former President of the eDiscovery Institute, a 501(c)(3) nonprofit research organization that conducts research and surveys to identify the most cost-effective ways to manage and produce electronically stored records. She currently is a faculty Member of Columbia University's Master of Science in Information and Knowledge Strategy, and a former faculty member of the school's Executive Master of Science in Technology Management.

Anne is a member of Advisory Board and former faculty for the Georgetown E-Discovery Training Academy, as well as a Sedona Conference® member. She also co-chairs the ABA's E-Discovery and Litigation Technology Committee for the Corporate Counsel Litigation Section Committee.