Federal Rules of Civil Procedure
Ediscovery Guide
Practical Analysis for Organizations and Legal Teams

Brought to you by KLDiscovery
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Introduction

Rule 1. Scope and Purpose

New Rule Provisions
Committee Note
Amendment Analysis
Courts and Parties Share Responsibility for Effective Litigation
Impact for Corporations and Law Firms
Cooperation is Key in Discovery

Rule 16. Pretrial Conferences; Scheduling; Management

New Rule Provisions
Committee Note
Amendment Analysis
More Effective Scheduling Conferences
Shorter Time Limits
More Comprehensive Scheduling Orders
Impact for Corporations and Law Firms
Litigants Should Be Ready for Discovery Because There Is No Time to Waste
Parties Should Meet Early and Often
Counsel Should Consider Clawbacks More Closely

Rule 26. Duty to Disclose; General Provisions; Governing Discovery

New Rule Provisions
Committee Note
Amendment Analysis
Scope of Discovery and Proportionality
Protective Orders for Costs
Discovery Requests Prior to Meet and Confer
Discovery Plan Proposals for Preservation and Clawbacks

Impact for Corporations and Law Firms

More Than Ever Before Litigants Need to Understand Proportionality

Parties Should Be Prepared for an Ever-Expanding Meet and Confer

Rule 34. Production of Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes

New Rule Provisions

Committee Note

Amendment Analysis

Specified Discovery Responses and Objections

Impact for Corporations and Law Firms

New Rule Eliminates Boilerplate Objections

Objection Rules Raise Issues About the Necessity to Log Withheld Information

Parties Must Produce by Specific Date in Lieu of Inspections

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

New Rule Provisions

Committee Note

Amendment Analysis

Uniform Standard for Sanctions

Scope of Rule Limited to Losses of ESI Meeting Specified Criteria

Reasonable Steps

Impact for Corporations and Law Firms

When It Comes to Preservation, Good Faith and Reasonableness Are Paramount
Introduction

On December 1, 2015, significant changes to the Federal Rules of Civil Procedure (Rules) affecting the legal discovery of electronically stored information (ESI) became effective for cases then pending or thereafter commenced. At the heart of the amendments is a renewed effort to provide judges and lawyers with practical tools to help move the discovery process along and keep costs in control. The amendments, including revisions to Rules 1, 16, 26, 34, and 37, are intended to provide new guidelines on the scope of discovery and the spoliation of ESI while emphasizing the need for proportionality and cooperation between parties.

Now, more than ever, both counselor and client will need to familiarize themselves with the rules changes and prepare for their impact on ediscovery. To that end, this guide provides the text of the major rules amendments and the accompanying Committee Notes. It also examines their impact on key ediscovery rule provisions, along with analysis for organizations and their legal teams.

For the latest ediscovery case law and statutory updates, visit www.KLDiscovery.com.
Scope and Purpose

New Rule Provisions

These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.

Committee Note

Rule 1 is amended to emphasize that just as the court should construe and administer these rules to secure the just, speedy, and inexpensive determination of every action, so the parties share the responsibility to employ the rules in the same way. Most lawyers and parties cooperate to achieve these ends. But discussions of ways to improve the administration of civil justice regularly include pleas to discourage overuse, misuse, and abuse of procedural tools that increase cost and result in delay. Effective advocacy is consistent with—and indeed depends upon—cooperative and proportional use of procedure.

This amendment does not create a new or independent source of sanctions. Neither does it abridge the scope of any other of these rules.

Amendment Analysis

Courts and Parties Share Responsibility for Effective Litigation

The amendment to Rule 1 is subtle, but important. The added language emphasizes that litigants and their attorneys, not just the courts,
have a responsibility to make litigation as efficient as possible. The Committee Note recognizes the balancing act between the adversarial nature of litigation and necessary cooperation throughout the litigation process. While the Committee Note states that this amendment does not mandate cooperation, it does highly encourage it and it foreshadows the emphasis on proportionality that runs throughout the amendments.

**Impact for Corporations and Law Firms**

*Cooperation is Key in Discovery*

Litigation by its very nature is adversarial. Nonetheless, even the most cutthroat lawyers understand the importance of cooperation and the impact that collaboration can have on the case budget and the overall outcome of the matter. When it comes to ediscovery, moreover, the case for cooperation is even more compelling given the complicated technical protocols and intersecting roles amongst inside counsel, law firms and service providers. The open question that organizations and counsel will need to deliberate going forward is how this renewed focus on cooperation will best translate into effective arrangements with the opposing party.
New Rule Provisions

(b) Scheduling.

(1) **Scheduling Order.** Except in categories of actions exempted by local rule, the district judge—or a magistrate judge when authorized by local rule—must issue a scheduling order:

(A) after receiving the parties’ report under Rule 26(f); or

(B) after consulting with the parties’ attorneys and any unrepresented parties at a scheduling conference by telephone, mail, or other means.

(2) **Time to Issue.** The judge must issue the scheduling order as soon as practicable, but in any event unless the judge finds good cause for delay, the judge must issue it within the earlier of 👇🏼 days after any defendant has been served with the complaint or 🍇 days after any defendant has appeared.

(3) **Contents of the Order.**

* * * * *

(B) **Permitted Contents.** The scheduling order may:

* * * * *

(iii) provide for disclosure, or discovery, or preservation of electronically stored information;

(iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements.
reached under Federal Rule of Evidence 502;  
(v) direct that before moving for an order relating to discovery, the movant must request a conference with the court;  
(vi) set dates for pretrial conferences and for trial; and  
(vii) include other appropriate matters.

**Committee Note**

The provision for consulting at a scheduling conference by “telephone, mail, or other means” is deleted. A scheduling conference is more effective if the court and parties engage in direct simultaneous communication. The conference may be held in person, by telephone, or by more sophisticated electronic means.

The time to issue the scheduling order is reduced to the earlier of 90 days (not 120 days) after any defendant has been served, or 60 days (not 90 days) after any defendant has appeared. This change, together with the shortened time for making service under Rule 4(m), will reduce delay at the beginning of litigation. At the same time, a new provision recognizes that the court may find good cause to extend the time to issue the scheduling order. In some cases it may be that the parties cannot prepare adequately for a meaningful Rule 26(f) conference and then a scheduling conference in the time allowed. Litigation involving complex issues, multiple parties, and large organizations, public or private, may be more likely to need extra time to establish meaningful collaboration between counsel and the people who can supply the information needed to participate in a useful way. Because the time for the Rule 26(f) conference is geared to the time for the scheduling conference or order, an order extending the time for the scheduling conference will also extend the time for the Rule 26(f) conference. But in most cases it will be desirable to hold at least a first scheduling conference in the time set by the rule.

Three items are added to the list of permitted contents in Rule 16(b)(3)(B).

The order may provide for preservation of electronically stored information, a topic also added to the provisions of a discovery plan under Rule 26(f)(3)(C). Parallel amendments of Rule 37(e) recognize that a duty to preserve discoverable information may arise before an action is filed.

The order also may include agreements incorporated in a court order under Evidence Rule 502 controlling the effects of disclosure of information covered by attorney-client privilege or work-product protection, a topic also added to the provisions of a discovery plan under Rule 26(f)(3)(D).

Finally, the order may direct that before filing a motion for an order relating to discovery the movant must request a conference with the court. Many judges who hold such conferences find them an efficient way to resolve most discovery disputes without the delay and burdens attending a formal motion, but the decision whether to require such conferences is left to the discretion of the judge in each case.
Amendment Analysis

More Effective Scheduling Conferences

The first amendment to 16(b)(1)(B) concerns logistics at the outset of litigation. The new rule deletes the language allowing the judge to issue a scheduling order after parties communicate by phone, mail or other means. Instead, the rule is intended to encourage parties to communicate directly at the scheduling conference or other circumstances where a live conversation can take place. The Committee Note explains that simultaneous conversation via in-person meetings, teleconferences or other electronic meeting forums is recommended. The change is intended to make scheduling conferences more effective by reducing delay and misunderstandings that are more commonplace via indirect communication methods.

Shorter Time Limits

Continuing with amendments to effectuate efficient litigation, the second amendment to Rule 16 reduces the time for courts to issue scheduling orders. Rule 16(b)(2) requires the judge to issue a scheduling order 90 days after any defendant has been served or 60 days after any defendant has appeared, whichever is earlier. The Committee Note, however, recognizes that in some complex cases, the court may extend a scheduling order if there is good cause for delay.

More Comprehensive Scheduling Orders

The final changes to Rule 16 allow for a more inclusive scheduling order, adding three key ediscovery topics. Courts are empowered to address the following new items in their scheduling orders:

- The preservation of electronically stored information;
- Clawback agreements reached under Federal Rule of Evidence 502; and
- A required discovery conference before either party moves for a discovery order.

The Committee Note highlights that two of these topics—preservation and privilege protection—are stressed several times throughout the 2015 rule amendments, emphasizing the importance of these areas.

Impact for Corporations and Law Firms

Litigants Should Be Ready for Discovery Because There Is No Time to Waste

Active case management is a prominent theme throughout the rule amendments. The reduction of time for courts to issue a scheduling order is intended to reduce delays at the outset of litigation. This will make early case assessment even more important. Practically speaking, as soon as possible, litigants need to know:

- Where their data lie and on what data sources
- What types of data are implicated
- How many custodians are relevant
- What timelines are involved
• Whether international data is involved
• What types of legal hold protocols are in place
• How data will be reviewed and produced

The changes also underscore the importance of deploying strong information governance policies in advance of litigation. Understanding the data landscape in advance of litigation will make everything more efficient downstream. Further, parties should develop an approach to ediscovery—even if they have never had to produce ESI in litigation before. Having a formal discovery protocol for managing data, coordinating personnel (such as IT departments, international offices, etc.) and leveraging outside help (such as consultants and technology providers) will be increasingly important to be better prepared with ever shortening timeframes.

**Parties Should Meet Early and Often**

Beyond shortened timeframes, the amendments are intended to discourage “drive-by” meet and confers. In the past, courts have frequently voiced dismay when ruling on ediscovery issues raised by parties that failed to meet and confer. Instead, the new rules require that parties communicate and be upfront; likewise, the amendments further clarify that judges will not tolerate foot-dragging or game-playing among parties during discovery.

Specifically, litigants should be prepared to:

• Engage in direct face-to-face or voice-to-voice communications at the scheduling conference
• Address more comprehensive scheduling orders from the court
• Resolve concerns upfront via discovery conferences before engaging in burdensome motion practice

Consider, for example, the need to discuss search protocols. If a proactive producing party solicits the requesting party for input over its tentative search protocol and its intent to use technology assisted review or predictive coding technologies, the requesting party has an incredible incentive to speak up. In fact, some courts will see this early communication as the requesting party’s exclusive opportunity to offer feedback or raise objections. The bottom line: by encouraging the parties to discuss discovery prior to the Rule 26(f) conference, amended Rule 16 incentivizes parties to be prepared earlier than ever before.

Under those conditions, disputes over “discovery about discovery” would never need to be presented to the court, because counsel would have reduced, early in the case, the potential for disagreements about proper discovery protocols and would have actively sought to avoid such agreements through cooperation. This is reinforced by the amendment to Rule 26(f), which requires the parties to have an enhanced “discovery plan” reflecting issues about ediscovery. Amended Rule 16 demonstrates an attempt to encourage courts to get parties to address their discovery concerns early on and not down the road.

**Counsel Should Consider Clawbacks More Closely**
Both judges and commentators have spoken at length about the importance of clawback agreements, which take advantage of Fed.R.Evid. 502. The basic fact is that just as man and machine will probably never be able to perfectly separate what is relevant from what is not, the same holds true for identifying and isolating privileged information. Mistakes happen in document review and production -- and they always will.

While this does incentivize proper protocols, it also stresses the importance of carving out an escape plan, such as a clawback agreement. The amendments to Rules 16 and 26(f) emphasize the importance of including a Fed.R.Evid. 502 agreement in order to recoup mistakenly produced privileged documents by allowing courts to address them in their scheduling orders. Without such an agreement, parties must show they took “reasonable steps” to prevent disclosure, among other requirements found in Rule 502. However, parties can modify these requirements, or eliminate them altogether, if they arrive at a properly worded Fed.R.Evid. 502 clawback agreement before discovery begins. What does this mean for parties? Under the new rules, there will be more pressure than ever before to enter into a clawback agreement—something most litigating parties often refuse.
New Rule Provisions

(b) Discovery Scope and Limits.

(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, including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).

(2) Limitations on Frequency and Extent.

* * * * *

(C) When Required. On motion or on its own, the court must limit the frequency or extent of discovery.
otherwise allowed by these rules or by local rule if it determines that:

* * * * *

(iii) the burden or expense of the proposed discovery is outside the scope permitted by Rule 26(b)(1) outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

* * * * *

(c) Protective Orders.

(1) In General. A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending—or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

* * * * *

(B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery;

* * * * *

(d) Timing and Sequence of Discovery.

* * * * *

(2) Early Rule 34 Requests.

(A) Time to Deliver. More than 21 days after the summons and complaint are served on a party, a request under Rule 34 may be delivered:

(i) to that party by any other party, and

(ii) by that party to any plaintiff or to any other party that has been served.

(B) When Considered Served. The request is considered to have been served at the first Rule 26(f) conference.

(23) Sequence. Unless, on motion, the parties stipulate or the court orders otherwise for the parties’ and witnesses’ convenience and in the interests of justice:

(A) methods of discovery may be used in any sequence; and

(B) discovery by one party does not require any other party to delay its discovery.

* * * * *

(f) Conference of the Parties; Planning for Discovery.

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(3) Discovery Plan. A discovery plan must state the parties’ views and proposals on:
(C) any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502;

* * * *

Committee Note
Rule 26(b)(1) is changed in several ways.

Information is discoverable under revised Rule 26(b)(1) if it is relevant to any party’s claim or defense and is proportional to the needs of the case. The considerations that bear on proportionality are moved from present Rule 26(b)(2)(C)(iii), slightly rearranged and with one addition.

Most of what now appears in Rule 26(b)(2)(C)(iii) was first adopted in 1983. The 1983 provision was explicitly adopted as part of the scope of discovery defined by Rule 26(b)(1). Rule 26(b)(1) directed the court to limit the frequency or extent of use of discovery if it determined that “the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties’ resources, and the importance of the issues at stake in the litigation.” At the same time, Rule 26(g) was added. Rule 26(g) provided that signing a discovery request, response, or objection certified that the request, response, or objection was “not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.” The parties thus shared the responsibility to honor these limits on the scope of discovery.

The 1983 Committee Note states that the new provisions were added “to deal with the problem of over-discovery. The objective is to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry. The new sentence is intended to encourage judges to be more aggressive in identifying and discouraging discovery overuse. The grounds mentioned in the amended rule for limiting discovery reflect the existing practice of many courts in issuing protective orders under Rule 26(c). . . . On the whole, however, district judges have been reluctant to limit the use of the discovery devices.”

The clear focus of the 1983 provisions may have been softened, although inadvertently, by the amendments made in 1993. The 1993 Committee Note explained: “[F]ormer paragraph (b)(1) [was] subdivided into two paragraphs for ease of reference and to avoid renumbering of paragraphs (3) and (4).” Subdividing the paragraphs, however, was done in a way that could be read to separate the proportionality provisions as “limitations,” no longer an integral part of the (b)(1) scope provisions. That
appearance was immediately offset by the next statement in the Note: “Textual changes are then made in new paragraph (2) to enable the court to keep tighter rein on the extent of discovery.”

The 1993 amendments added two factors to the considerations that bear on limiting discovery: whether “the burden or expense of the proposed discovery outweighs its likely benefit,” and “the importance of the proposed discovery in resolving the issues.” Addressing these and other limitations added by the 1993 discovery amendments, the Committee Note stated that “[t]he revisions in Rule 26(b)(2) are intended to provide the court with broader discretion to impose additional restrictions on the scope and extent of discovery. . . .”

The relationship between Rule 26(b)(1) and (2) was further addressed by an amendment made in 2000 that added a new sentence at the end of (b)(1): “All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii) [now Rule 26(b)(2)(C)].” The Committee Note recognized that “[t]hese limitations apply to discovery that is otherwise within the scope of subdivision (b) (1).” It explained that the Committee had been told repeatedly that courts were not using these limitations as originally intended. “This otherwise redundant cross-reference has been added to emphasize the need for active judicial use of subdivision (b)(2) to control excessive discovery.”

The present amendment restores the proportionality factors to their original place in defining the scope of discovery. This change reinforces the Rule 26(g) obligation of the parties to consider these factors in making discovery requests, responses, or objections.

Restoring the proportionality calculation to Rule 26(b)(1) does not change the existing responsibilities of the court and the parties to consider proportionality, and the change does not place on the party seeking discovery the burden of addressing all proportionality considerations.

Nor is the change intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional. The parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes.

The parties may begin discovery without a full appreciation of the factors that bear on proportionality. A party requesting discovery, for example, may have little information about the burden or expense of responding. A party requested to provide discovery may have little information about the importance of the discovery in resolving the issues as understood by the requesting party. Many of these uncertainties should be addressed and reduced in the parties’ Rule 26(f) conference and in scheduling and pretrial conferences with the court. But if the parties continue to disagree, the discovery dispute could be brought before the court and the parties’ responsibilities would remain as they have been since 1983. A party claiming undue burden or expense ordinarily has far better information—perhaps the only information—with respect to that part of the determination. A party claiming that a request is important to resolve the issues should be able to explain the ways in which the underlying information bears on the issues as that party
understands them. The court’s responsibility, using all the information provided by the parties, is to consider these and all the other factors in reaching a case-specific determination of the appropriate scope of discovery.

The direction to consider the parties’ relative access to relevant information adds new text to provide explicit focus on considerations already implicit in present Rule 26(b)(2)(C)(iii). Some cases involve what often is called “information asymmetry.” One party—often an individual plaintiff—may have very little discoverable information. The other party may have vast amounts of information, including information that can be readily retrieved and information that is more difficult to retrieve. In practice these circumstances often mean that the burden of responding to discovery lies heavier on the party who has more information, and properly so.

Restoring proportionality as an express component of the scope of discovery warrants repetition of parts of the 1983 and 1993 Committee Notes that must not be lost from sight. The 1983 Committee Note explained that “[t]he rule contemplates greater judicial involvement in the discovery process and thus acknowledges the reality that it cannot always operate on a self-regulating basis.” The 1993 Committee Note further observed that “[t]he information explosion of recent decades has greatly increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument for delay or oppression.” What seemed an explosion in 1993 has been exacerbated by the advent of ediscovery. The present amendment again reflects the need for continuing and close judicial involvement in the cases that do not yield readily to the ideal of effective party management. It is expected that discovery will be effectively managed by the parties in many cases. But there will be important occasions for judicial management, both when the parties are legitimately unable to resolve important differences and when the parties fall short of effective, cooperative management on their own.

It also is important to repeat the caution that the monetary stakes are only one factor, to be balanced against other factors. The 1983 Committee Note recognized “the significance of the substantive issues, as measured in philosophic, social, or institutional terms. Thus the rule recognizes that many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved.” Many other substantive areas also may involve litigation that seeks relatively small amounts of money, or no money at all, but that seeks to vindicate vitally important personal or public values.

So too, consideration of the parties’ resources does not foreclose discovery requests addressed to an impecunious party, nor justify unlimited discovery requests addressed to a wealthy party. The 1983 Committee Note cautioned that “[t]he court must apply the standards in an even-handed manner that will prevent use of discovery to wage a war of attrition or as a device to coerce a party, whether financially weak or affluent.”

The burden or expense of proposed discovery should be determined in a realistic way. This
includes the burden or expense of producing electronically stored information. Computer-based method of searching such information continue to develop, particularly for cases involving large volumes of electronically stored information. Courts and parties should be willing to consider the opportunities for reducing the burden or expense of discovery as reliable means of searching electronically stored information become available.

A portion of present Rule 26(b)(1) is omitted from the proposed revision. After allowing discovery of any matter relevant to any party's claim or defense, the present rule adds: “including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter.” Discovery of such matters is so deeply entrenched in practice that it is no longer necessary to clutter the long text of Rule 26 with these examples. The discovery identified in these examples should still be permitted under the revised rule when relevant and proportional to the needs of the case. Framing intelligent requests for electronically stored information, for example, may require detailed information about another party's information systems and other information resources.

The amendment deletes the former provision authorizing the court, for good cause, to order discovery of any matter relevant to the subject matter involved in the action. The Committee has been informed that this language is rarely invoked. Proportional discovery relevant to any party's claim or defense suffices, given a proper understanding of what is relevant to a claim or defense. The distinction between matter relevant to a claim or defense and matter relevant to the subject matter was introduced in 2000. The 2000 Note offered three examples of information that, suitably focused, would be relevant to the parties' claims or defenses. The examples were “other incidents of the same type, or involving the same product”; “information about organizational arrangements or filing systems”; and “information that could be used to impeach a likely witness.” Such discovery is not foreclosed by the amendments. Discovery that is relevant to the parties' claims or defenses may also support amendment of the pleadings to add a new claim or defense that affects the scope of discovery.

The former provision for discovery of relevant but inadmissible information that appears “reasonably calculated to lead to the discovery of admissible evidence” is also deleted. The phrase has been used by some, incorrectly, to define the scope of discovery. As the Committee Note to the 2000 amendments observed, use of the “reasonably calculated” phrase to define the scope of discovery “might swallow any other limitation on the scope of discovery.” The 2000 amendments sought to prevent such misuse by adding the word “Relevant” at the beginning of the sentence, making clear that “‘relevant’ means within the scope of discovery as defined in this subdivision . . . .” The “reasonably calculated” phrase has continued to create problems, however, and is removed by these amendments. It is replaced by the direct statement that “Information within the scope of discovery need not be admissible in evidence to be discoverable.” Discovery of nonprivileged information not admissible in evidence remains
available so long as it is otherwise within the scope of discovery.

Rule 26(b)(2)(C)(iii) is amended to reflect the transfer of the considerations that bear on proportionality to Rule 26(b)(1). The court still must limit the frequency or extent of proposed discovery, on motion or on its own, if it is outside the scope permitted by Rule 26(b)(1).

Rule 26(c)(1)(B) is amended to include an express recognition of protective orders that allocate expenses for disclosure or discovery. Authority to enter such orders is included in the present rule, and courts already exercise this authority. Explicit recognition will forestall the temptation some parties may feel to contest this authority. Recognizing the authority does not imply that cost-shifting should become a common practice. Courts and parties should continue to assume that a responding party ordinarily bears the costs of responding.

Rule 26(d)(2) is added to allow a party to deliver Rule 34 requests to another party more than 21 days after that party has been served even though the parties have not yet had a required Rule 26(f) conference. Delivery may be made by any party to the party that has been served, and by that party to any plaintiff and any other party that has been served. Delivery does not count as service; the requests are considered to be served at the first Rule 26(f) conference. Under Rule 34(b)(2)(A) the time to respond runs from service. This relaxation of the discovery moratorium is designed to facilitate focused discussion during the Rule 26(f) conference. Discussion at the conference may produce changes in the requests. The opportunity for advance scrutiny of requests delivered before the Rule 26(f) conference should not affect a decision whether to allow additional time to respond.

Rule 26(d)(3) is renumbered and amended to recognize that the parties may stipulate to case-specific sequences of discovery.

Rule 26(f)(3) is amended in parallel with Rule 16(b)(3) to add two items to the discovery plan—issues about preserving electronically stored information and court orders under Evidence Rule 502.

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**Amendment Analysis**

**Scope of Discovery and Proportionality**

The changes to Rule 26(b)(1) are intended to emphasize that parties may obtain discovery of non-privileged information, including ESI, that is both relevant and proportional to the needs of the case. In order to make that point, the amendment relocates and rearranges the proportionality considerations from Rule 26(b)(2)(C)(iii) into Rule 26(b)(1). In response to public comments, it also adds a new consideration—the parties’ relative access to information—and explains in a revised Committee Note that these changes simply restore the emphasis on proportionality to Rule 26(b)(1).

In addition, a number of important deletions are made from Rule 26(b)(1). The amended rule removes the previous “reasonably calculated to lead to the discovery of admissible evidence” language, in favor of an emphasis on the
parties’ obligations to consider proportionality throughout the discovery process. It also deletes the authority to seek discovery relevant to the subject matter involved and omits the (unnecessary) list of examples, thereby shortening the rule.

Under the amended Rule 26(b)(1), the relevant considerations in determining whether discovery is proportional to the needs of the case include:

- The importance of the issues at stake;
- The amount in controversy;
- The parties’ relative access to relevant information;
- The parties’ resources;
- The importance of discovery in resolving the issues; and
- Whether the burden or expense outweighs its likely benefit.

These factors have been slightly reordered from their previous location in response to public comments, with “amount in controversy” being moved behind the “importance of issues at stake” factor to the first position in the list. As noted, the amended list now includes a new factor in the third position, “parties’ relative access to relevant information.” The Committee Note emphasizes that moving the proportionality standard from Rule 26(b)(2)(C)(iii) to its prominent position in Rule 26(b)(1) “does not change the existing responsibilities of the court and parties to consider proportionality.” Rather, the court and the parties have a continuing, “collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes.”

**Protective Orders for Costs**

Rule 26(c)(1)(B) is amended to explicitly acknowledge that a protective order issued for good cause may allocate costs amongst the parties. The Committee Note explains that the “[a]uthority to enter such orders [shifting costs] is included in the present rule” and courts are coming to exercise this authority.

In response to public comments, the Committee Note further clarifies that “[r]ecognizing the authority to shift the costs of discovery does not mean that cost-shifting should become a common practice” and that “[c]ourts and parties should continue to assume that a responding party ordinarily bears the costs of responding.” While the Rules Committee intends to take a look at more comprehensive cost-shifting proposals at some point, it has signaled that it wants to see what impact the renewed emphasis on proportionality has before undertaking that task.

**Discovery Requests Prior to Meet and Confer**

A new provision (Rule 26(d)(2)(“Early Rule 34 Requests”)) will be added to allow “delivery” of discovery requests prior to the “meet and confer” required by Rule 26(f). The intent of this relaxation of the existing “discovery moratorium” is “designed to facilitate focused discussion during the Rule 26(f) conference,” since discussion may produce changes in the requests.
However, if that option is exercised, the response time will not commence, however, until after the first Rule 26(f) conference—these requests are deemed served at the time of the conference. Rule 34(b)(2)(A) will be amended by a parallel provision as to the time to respond “if the request was delivered under 26(d)(2) – within 30 days after the parties’ first Rule 26(f) conference.”

**Discovery Plan Proposals for Preservation and Clawbacks**

As noted in connection with the discussion of enhanced Rule 16 (b), a parallel amendment to Rule 26(f)(3)(D) requires that a discovery plan must include a statement of the parties’ views and proposals on preservation of ESI as well as issues about claims of privilege, including whether to ask the court for an order under Fed.R.Evid. 502. The Committee Note also alludes to the wisdom of consideration of the potential use of more sophisticated document sorting and collection tools.

**Impact for Corporations and Law Firms**

**More Than Ever Before Litigants Need to Understand Proportionality**

The changes to Rule 26 are intended to restore the proportionality factors to a prominent consideration by both requesting and producing parties, and to encourage a dialogue between the parties—and the court, if necessary—regarding the amount of discovery reasonably needed in light of the claims and defenses in the case. This shift to an emphasis on proportionality is accompanied by elimination of an often-cited basis for allowing virtually unlimited discovery—the “reasonably calculated to lead to the discovery of admissible evidence” language. However, it should be noted that at the end of the proportionality factors in Rule 26(b)(1), the new rule does include the following language, “Information within this scope of discovery need not be admissible in evidence to be discoverable.”

The Committee Note explains that these amendments do not alter existing responsibilities to consider proportionality and that the parties and the court have a collective responsibility to address proportionality. Practically speaking, this focus on proportionality may oblige parties to compromise more frequently when it comes to number of custodians, timeframes, data locations, search terms and other discovery parameters.

Parties that believe something is not proportional should raise the issue (i.e., by way of objection or a motion for a protective order) as early as possible if it is not possible to secure agreement to restrict discovery requests. Information cannot be withheld solely on the basis of proportionality, so parties should not sit on their hands. Instead, they should be up front about their objections, which now must be stated with specificity under amended Rule 34.

It remains to be seen if the addition of the new factor involving the relative access to information will be interpreted to diminish objections based on burden. The Committee Note declares that the burden is “heavier on the party who has more information, and properly so.” Courts may expect parties with broad sources of information...
to be prepared to retrieve their information quickly and efficiently. This will be especially true for corporations, which puts an emphasis on solid information governance protocols and ediscovery collection techniques. Moreover, while it remains unclear as to the extent the new Rule 26(b)(1) will limit discovery, this amendment makes it even more important to start planning for potential litigation up front. Managing the litigation more efficiently while working with critical actors such as IT departments or vendors will result in time and money saved in the long run.

*Parties Should Be Prepared for an Ever-Expanding Meet and Confer*

The amendments to Rule 26—along with the previously discussed amendments to Rule 16—seek to encourage earlier communication between the parties to facilitate meaningful discussions about the scope of preservation and clawback agreements at the 26(f) conference. While the new rules seem to reflect an increased expectation on the parties, the Committee Note also states that the 2015 amendments reflect “the need for continuing and close judicial involvement in the cases that do not yield readily to the ideal of effective party management.” Anytime there is a major discovery dispute after the meet and confer, parties can expect a judge to require them to go back and do it again.

By allowing Rule 34 delivery (not service) of requests for production prior to the 26(f) conference, the revised rule hopes to encourage more meaningful discovery discussion between the parties at the 26(f) conference. Some pushback among commentators has been that this risks taking away from the importance of early discussions about preservation. Others see that as enhancing the discussion. In any event, the coordinated amendments portent, for courts and parties willing to do so, the need for greater urgency to get discovery issues worked out early before collection, review and production.
(b) Procedure.

(2) Responses and Objections.

(A) Time to Respond. The party to whom the request is directed must respond in writing within 30 days after being served or—if the request was delivered under Rule 26(d)(2)—within 30 days after the parties’ first Rule 26(f) conference. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(B) Responding to Each Item. For each item or category, the response must either state that inspection and related activities will be permitted as requested or state an objection with specificity the grounds for objecting to the request, including the reasons. The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.

(C) Objections. An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest.
Committee Note

Several amendments are made in Rule 34, aimed at reducing the potential to impose unreasonable burdens by objections to requests to produce.

Rule 34(b)(2)(A) is amended to fit with new Rule 26(d)(2). The time to respond to a Rule 34 request delivered before the parties’ Rule 26(f) conference is 30 days after the first Rule 26(f) conference.

Rule 34(b)(2)(B) is amended to require that objections to Rule 34 requests be stated with specificity. This provision adopts the language of Rule 33(b)(4), eliminating any doubt that less specific objections might be suitable under Rule 34. The specificity of the objection ties to the new provision in Rule 34(b)(2)(C) directing that an objection must state whether any responsive materials are being withheld on the basis of that objection. An objection may state that a request is overbroad, but if the objection recognizes that some part of the request is appropriate the objection should state the scope that is not overbroad. Examples would be a statement that the responding party will limit the search to documents or electronically stored information created within a given period of time prior to the events in suit, or to specified sources. When there is such an objection, the statement of what has been withheld can properly identify as matters “withheld” anything beyond the scope of the search specified in the objection.

Rule 34(b)(2)(B) is further amended to reflect the common practice of producing copies of documents or electronically stored information rather than simply permitting inspection. The response to the request must state that copies will be produced. The production must be completed either by the time for inspection specified in the request or by another reasonable time specifically identified in the response. When it is necessary to make the production in stages the response should specify the beginning and end dates of the production.

Rule 34(b)(2)(C) is amended to provide that an objection to a Rule 34 request must state whether anything is being withheld on the basis of the objection. This amendment should end the confusion that frequently arises when a producing party states several objections and still produces information, leaving the requesting party uncertain whether any relevant and responsive information has been withheld on the basis of the objections. The producing party does not need to provide a detailed description or log of all documents withheld, but does need to alert other parties to the fact that documents have been withheld and thereby facilitate an informed discussion of the objection. An objection that states the limits that have controlled the search for responsive and relevant materials qualifies as a statement that the materials have been “withheld.”

Amendment Analysis

Specified Discovery Responses and Objections

Rule 34 is substantially amended in three parts. Taken as a whole, these amendments aim to limit any confusion with regards to production
obligations and objections to requests for production.

First, Rule 34(b)(2)(A) is amended to align with new Rule 26(d)(2) that affords parties the option of delivering requests for production before the Rule 26(f) conference. Next, new amendments to Rule 34(b)(2)(B) require that objections to Rule 34 requests must “be stated with specificity.” In addition, Rule 34(b)(2)(B) will be revised to recognize the common practice whereby a responding party produces copies of documents or ESI instead of permitting inspection. Last, Rule 34(b)(2)(C) requires parties objecting to a Rule 34 request to disclose whether or not any responsive information is being withheld based on the objection and the Committee Note attempts to explain how that requirement can be met in the complex world of ediscovery.

Impact for Corporations and Law Firms

New Rule Eliminates Boilerplate Objections

The necessity for making specific objections is likely to have an impact on the use of boilerplate objections. Broad and boilerplate objections will no longer be allowed in discovery disputes. While the Committee Note suggests that an objection may be raised to the broad nature of a request, that objection must state that the scope is not overbroad if a portion of that request remains appropriate.

Objection Rules Raise Issues About the Necessity to Log Withheld Information

The requirement for specificity of objections ties directly with the new provision that an objection must also include whether any responsive materials are withheld on the basis of that objection. The Committee clearly intends to prevent misleading objections, which leave the requesting party in the dark about whether information is nonetheless being withheld after a partial production. Based on these revisions, parties may benefit from keeping a running record of material withheld (i.e., privilege log), making it easier to state the reason for the objection and to demonstrate to both the other party and the court what items are being withheld. Although a “detailed description or log of all documents withheld” need not be furnished, parties must “alert” the other party and facilitate an informed discussion of withheld material. An objection which states the limit of the search parameters (such as number of custodians, dates, data sources, etc.) would suffice as a statement that materials have been withheld.

Parties Must Produce by Specific Date in Lieu of Inspections

The amended rule also mandates that producing documents in lieu of a request for inspection must be completed “no later than the time for inspection specified in the request or another reasonable time specified in the response.” Some practices before this new rule saw parties stating that documents would be produced in the future without committing to a specific date. This new rule will eliminate that ambiguous approach by forcing parties to agree to specific dates in returning a response to prevent game-playing and to force parties to keep a schedule—
although there may be some disagreement as to what constitutes producing within a “reasonable time.” The new rules, whether in scheduling or in production, reflect a new urgency on the processes of collection and production. Parties will do well to have a thorough understanding regarding the status of their data well before discovery requests and productions transpire.
New Rule Provisions

(a) Motion for an Order Compelling Disclosure or Discovery.

* * * * *

(3) Specific Motions.

* * * * *

(B) To Compel a Discovery Response. A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:

* * * * *

(iv) a party fails to produce documents or fails to respond that inspection will be permitted—or fails to permit inspection—as requested under Rule 34.

* * * * *

(e) Failure to Provide Preserved 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. 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.

* * * * *

Committee Note

Subdivision (a). Rule 37(a)(3)(B)(iv) is amended to reflect the common practice of producing copies of documents or electronically stored information rather than simply permitting inspection. This change brings item (iv) into line with paragraph (B), which provides a motion for an order compelling “production, or inspection.”

Subdivision (e). Present Rule 37(e), adopted in 2006, provides: “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 limited rule has not adequately addressed the serious problems resulting from the continued exponential growth in the volume of such information. Federal circuits have established significantly different standards for imposing sanctions or curative measure on parties who fail to preserve electronically stored information. These developments have cause litigants to expend excessive effort and money on preservation in order to avoid the risk of severe sanctions if a court finds they did not do enough.

New Rule 37(e) replaces the 2006 rule. It authorizes and specifies measures a court may employ if information that should have been preserved is lost, and specifies the findings necessary to justify these measures. It therefore forecloses reliance on inherent authority or state law to determine when certain measures should be used. The rule does not affect the validity of an independent tort claim for spoliation if state law applies in a case and authorizes the claim.

The new rule applies only to electronically stored information, also the focus of the 2006 rule. It applies only when such information is lost. Because electronically stored information often exists in multiple locations, loss from one source may often be harmless when substitute information can be found elsewhere.

The new rule applies only if the lost information should have been preserved in the anticipation or conduct of litigation and the party failed to take reasonable steps to preserve it. Many court decisions hold that potential litigants have a duty to preserve relevant information when litigation is reasonably foreseeable. Rule 37(e) is based on this common-law duty; it does not attempt to create a new duty to preserve. The rule does not apply when information is lost before a duty to preserve arises.
In applying the rule, a court may need to decide whether and when a duty to preserve arose. Courts should consider the extent to which a party was on notice that litigation was likely and that the information would be relevant. A variety of events may alert a party to the prospect of litigation. Often these events provide only limited information about the prospective litigation, however, so that the scope of information that should be preserved may remain uncertain. It is important not to be blinded to this reality by hindsight arising from familiarity with an action as it is actually filed.

Although the rule focuses on the common-law obligation to preserve in the anticipation or conduct of litigation, courts may sometimes consider whether there is an independent requirement that the lost information be preserved. Such requirements arise from many sources— statutes, administrative regulations, an order in another case, or a party’s own information-retention protocols. The court should be sensitive, however, to the fact that such independent preservation requirements may be addressed to a wide variety of concerns unrelated to the current litigation. The fact that a party had an independent obligation to preserve information does not necessarily mean that it had such a duty with respect to litigation, and the fact that the party failed to observe some other preservation obligation does not itself prove that its efforts to preserve were not reasonable with respect to a particular case.

The duty to preserve may in some instances be triggered or clarified by a court order in the case. Preservation orders may become more common, in part because Rules 16(b)(3)(B)(iii) and 26(f) (3)(C) are amended to encourage discovery plans and orders that address preservation. Once litigation has commenced, if the parties cannot reach agreement about preservation issues, promptly seeking judicial guidance about the extent of reasonable preservation may be important.

The rule applies only if the information was lost because the party failed to take reasonable steps to preserve the information. Due to the ever-increasing volume of electronically stored information and the multitude of devices that generate such information, perfection in preserving all relevant electronically stored information is often impossible. As under the current rule, the routine, good-faith operation of an electronic information system would be a relevant factor for the court to consider in evaluating whether a party failed to take reasonable steps to preserve lost information, although the prospect of litigation may call for reasonable steps to preserve information by intervening in that routine operation. This rule recognizes that “reasonable steps” to preserve suffice; it does not call for perfection. The court should be sensitive to the party’s sophistication with regard to litigation in evaluating preservation efforts; some litigants, particularly individual litigants, may be less familiar with preservation obligations than others who have considerable experience in litigation.

Because the rule calls only for reasonable steps to preserve, it is inapplicable when the loss of information occurs despite the party’s reasonable steps to preserve. For example, the information may not be in the party’s control. Or information the party has preserved may be destroyed by
events outside the party’s control—the computer room may be flooded, a “cloud” service may fail, a malign software attack may disrupt a storage system, and so on. Courts may, however, need to assess the extent to which a party knew of and protected against such risks.

Another factor in evaluating the reasonableness of preservation efforts is proportionality. The court should be sensitive to party resources; aggressive preservation efforts can be extremely costly, and parties (including governmental parties) may have limited staff and resources to devote to those efforts. A party may act reasonably by choosing a less 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. A party urging that preservation requests are disproportionate may need to provide specifics about these matters in order to enable meaningful discussion of the appropriate preservation regime.

When a party fails to take reasonable steps to preserve electronically stored information that should have been preserved in the anticipation or conduct of litigation, and the information is lost as a result, Rule 37(e) directs that the initial focus should be on whether the lost information can be restored or replaced through additional discovery. Nothing in the rule limits the court’s powers under Rules 16 and 26 to authorize additional discovery. Orders under Rule 26(b)(2)(B) regarding discovery from sources that would ordinarily be considered inaccessible or under Rule 26(c)(1)(B) on allocation of expenses may be pertinent to solving such problems. If the information is restored or replaced, no further measures should be taken. At the same time, it is important to emphasize that efforts to restore or replace lost information through discovery should be proportional to the apparent importance of the lost information to claims or defenses in the litigation. For example, substantial measures should not be employed to restore or replace information that is marginally relevant or duplicative.

**Subdivision (e)(1).** This subdivision applies only if information should have been preserved in the anticipation or conduct of litigation, a party failed to take reasonable steps to preserve the information, information was lost as a result, and the information could not be restored or replaced by additional discovery. In addition, a court may resort to (e)(1) measures only “upon finding prejudice to another party from loss of the information.” An evaluation of prejudice from the loss of information necessarily includes an evaluation of the information’s importance in the litigation.

The rule does not place a burden of proving or disproving prejudice on one party or the other. Determining the content of lost information may be a difficult task in some cases, and placing the burden of proving prejudice on the party that did not lose the information may be unfair. In other situations, however, the content of the lost information may be fairly evident, the information may appear to be unimportant, or the abundance of preserved information may appear sufficient to meet the needs of all parties. Requiring the party seeking curative measures to prove prejudice may be reasonable in such
situations. The rule leaves judges with discretion to determine how best to assess prejudice in particular cases.

Once a finding of prejudice is made, the court is authorized to employ measures “no greater than necessary to cure the prejudice.” The range of such measures is quite broad if they are necessary for this purpose. There is no all-purpose hierarchy of the severity of various measures; the severity of given measures must be calibrated in terms of their effect on the particular case. But authority to order measures no greater than necessary to cure prejudice does not require the court to adopt measures to cure every possible prejudicial effect. Much is entrusted to the court’s discretion.

In an appropriate case, it may be that serious measures are necessary to cure prejudice found by the court, such as forbidding the party that failed to preserve information from putting on certain evidence, permitting the parties to present evidence and argument to the jury regarding the loss of information, or giving the jury instructions to assist in its evaluation of such evidence or argument, other than instructions to which subdivision (e)(2) applies. Care must be taken, however, to ensure that curative measures under subdivision (e)(1) do not have the effect of measures that are permitted under subdivision (e)(2) only on a finding of intent to deprive another party of the lost information’s use in the litigation. An example of an inappropriate (e)(1) measure might be an order striking pleadings related to, or precluding a party from offering any evidence in support of, the central or only claim or defense in the case. On the other hand, it may be appropriate to exclude a specific item of evidence to offset prejudice caused by failure to preserve other evidence that might contradict the excluded item of evidence.

Subdivision (e)(2). This subdivision authorizes courts to use specified and very severe measures to address or deter failures to preserve electronically stored information, but only on finding that the party that lost the information acted with the intent to deprive another party of the information’s use in the litigation. It is designed to provide a uniform standard in federal court for use of these serious measures when addressing failure to preserve electronically stored information. It rejects cases such as Residential Funding Corp. v. DeGeorge Financial Corp., 306 F.3d 99 (2d Cir. 2002), that authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence.

Adverse-inference instructions were developed on the premise that a party’s intentional loss or destruction of evidence to prevent its use in litigation gives rise to a reasonable inference that the evidence was unfavorable to the party responsible for loss or destruction of the evidence. Negligent or even grossly negligent behavior does not logically support that inference. Information lost through negligence may have been favorable to either party, including the party that lost it, and inferring that it was unfavorable to that party may tip the balance at trial in ways the lost information never would have. The better rule for the negligent or grossly negligent loss of electronically stored information is to preserve a broad range of measures to cure prejudice caused by its loss, but to limit the most severe measures to instances of intentional loss or destruction.
Similar reasons apply to limiting the court’s authority to presume or infer that the lost information was unfavorable to the party who lost it when ruling on a pretrial motion or presiding at a bench trial. Subdivision (e)(2) limits the ability of courts to draw adverse inferences based on the loss of information in these circumstances, permitting them only when a court finds that the information was lost with the intent to prevent its use in litigation.

Subdivision (e)(2) applies to jury instructions that permit or require the jury to presume or infer that lost information was unfavorable to the party that lost it. Thus, it covers any instruction that directs or permits the jury to infer from the loss of information that it was in fact unfavorable to the party that lost it. The subdivision does not apply to jury instructions that do not involve such an inference. For example, subdivision (e)(2) would not prohibit a court from allowing the parties to present evidence to the jury concerning the loss and likely relevance of information and instructing the jury that it may consider that evidence, along with all the other evidence in the case, in making its decision. These measures, which would not involve instructing a jury it may draw an adverse inference from loss of information, would be available under subdivision (e)(1) if no greater than necessary to cure prejudice. In addition, subdivision (e)(2) does not limit the discretion of courts to give traditional missing evidence instructions based on a party’s failure to present evidence it has in its possession at the time of trial.

Subdivision (e)(2) requires a finding that the party acted with the intent to deprive another party of the information’s use in the litigation. This finding may be made by the court when ruling on a pretrial motion, when presiding at a bench trial, or when deciding whether to give an adverse inference instruction at trial. If a court were to conclude that the intent finding should be made by a jury, the court’s instruction should make clear that the jury may infer from the loss of the information that it was unfavorable to the party that lost it only if the jury first finds that the party acted with the intent to deprive another party of the information’s use in the litigation. If the jury does not make this finding, it may not infer from the loss that the information was unfavorable to the party that lost it.

Subdivision (e)(2) does not include a requirement that the court find prejudice to the party deprived of the information. This is because the finding of intent required by the subdivision can support not only an inference that the lost information was unfavorable to the party that intentionally destroyed it, but also an inference that the opposing party was prejudiced by the loss of information that would have favored its position. Subdivision (e)(2) does not require any further finding of prejudice.

Courts should exercise caution, however, in using the measures specified in (e)(2). Finding an intent to deprive another party of the lost information’s use in the litigation does not require a court to adopt any of the measures listed in subdivision (e)(2). The remedy should fit the wrong, and the severe measures authorized by this subdivision should not be used when the information lost was relatively unimportant or lesser measures such as those specified in subdivision (e)(1) would be sufficient to redress the loss.
Amendment Analysis

Uniform Standard for Sanctions

Revised Rule 37(e) addresses and resolves a historical split among the Federal Circuits concerning the level of culpability required to issue severe sanctions, including adverse inferences, for failing to preserve electronically stored information. One group of Circuits only required a finding of negligent failure to preserve ESI, while others required a finding of bad faith.

The amendment to Rule 37(e) completely replaces the previous version of the rule and will only permit the most serious sanctions when there is proof of an “intent to deprive” a party of the use of ESI in the course of the matter, thereby displacing the existing Circuit rulings on the topic, which were based on the exercise of inherent sanction power. The new rule, however, broadly authorizes courts to impose measures designed to address the prejudice from covered losses without a showing of culpability provided that they are no greater than necessary to do so and do not constitute the type of case-dispositive measures that require a showing of specific intent to deprive.

Scope of Rule Limited to Losses of ESI Meeting Specified Criteria

The rule was significantly revised after public comment so as to apply only to failures to preserve ESI which has been lost as the result of a failure to take “reasonable steps” to preserve and which cannot be restored or replaced by additional discovery. If these threshold requirements are not met, none of the measures available under the revised rule may be imposed by a court.

The Committee Note explains that the new Rule 37(e) does not create a new duty to preserve, but rather codifies the existing common law duty to preserve relevant information when litigation is reasonably foreseeable. It is clear, however, that by imposing the threshold requirements, a significant overlay on the common law requirements has been posited by the Rules Committee and it remains to be seen whether and how courts will react to the new provisions.

Reasonable Steps

The Committee Note also clarifies that “reasonable steps to preserve suffice; it does not call for perfection,” but also mentions that proportionality, including consideration of the party’s resources, will be a factor when evaluating the reasonableness of preservation efforts. This represents a move away from a strict liability test and a move toward an assessment on good faith and proportionality when it comes to the duty to preserve.

Impact for Corporations and Law Firms

When It Comes to Preservation, Good Faith and Reasonableness are Paramount

It is no secret that preservation is one of the thorniest issues in ediscovery. With data volumes and locations rising year-over-year, how does an organization and its counsel ensure that all relevant documents are protected and
anything else is sent to the digital equivalent of a paper shredder? Unfortunately, preservation is a balancing act. Preserve too much and an organization is exposed to increased costs and risk associated with saving out-of-date records; save too little and an organization faces possible sanctions for destroying potentially relevant information when litigation was reasonably foreseeable. Striking this balance is not easy, as evidenced by an abundance of past judicial opinions deliberating the validity of sanctions when ESI is lost. Unfortunately, despite a bulk of case law, there are no bright line rules and, even worse, a split was starting to develop amongst courts.

The changes to Rule 37 are designed to reset the preservation duty by allowing courts and counsel to use good faith and reasonableness as the guide, and granting courts flexibility in determining an appropriate sanction for errors. If a party fails to take reasonable steps to preserve information it should have preserved, and it cannot be restored or replaced, Rule 37(e)(1) permits a broad range of measures short of the harsh measures barred by Rule 37(e)(2) without a showing of specific intent. Subdivision (e)(1) requires no additional showing of culpability, provided the measures are “no greater than necessary to cure the prejudice.”

For organizations and law firms, the question remains how best to make a good faith effort in preserving data. The Rules Committee adopted the “reasonable steps” test to encourage responsible and targeted preservation and retention efforts. Instead of preserving or retaining information from an entire department in an organization, targeting individual custodians may demonstrate an appropriate showing of good faith to the courts. Further, implementing solid information governance protocols—from setting and enforcing policies to understanding how data flows across an organization via a data map—will allow the court to see that organizations and law firms are thinking critically about how their information is stored and can contribute to a good faith showing.

In addition, proactive parties may wish to consider obtaining a preservation agreement from the opposing party, taking sanctions arguments off the table completely in most situations. All in all, these preservation and sanction scenarios are likely to play out in judicial opinions in the coming months and years, as courts grapple with the definitions of reasonableness and good faith.

While any organization’s efforts to preserve will be retroactively assessed on good faith and proportionality, proportionality is not a good tool for planning. Nonetheless forward-thinking organizations should make sure to proactively demonstrate good faith efforts in preserving their data.
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