Civil Justice Playbook

IDEAS, INITIATIVES & INFLUENCE

Just Follow the Rules!

FRCP amendments could be e-discovery game changer

MCC INTERVIEW: Hon. John M. Facciola (Ret.), Hon. Mary M. Rowland Jennifer A. Brennan / iDiscovery Solutions

*Magistrate Judges **John M. Facciola (Ret.)** and **Mary M. Rowland** provide a view from the bench and join iDiscovery Solutions director **Jennifer A. Brennan** in a discussion of the substance and impact of impending amendments to the Federal Rules of Civil Procedure.*

MCC: Which of the Federal Rules of Civil Procedure are subject to amendment, and when will the amendments become effective?

Brennan: The amendments represent the most sweeping changes to the federal civil rules in years and directly impact electronic discovery. The more notable changes affect Rule 26(b), which defines the scope of discovery, Rule 37(e), which outlines the sanctions available to remedy the loss of electronically stored information, and Rule 34, which pertains to document production requests.

The amended rules take effect on December 1, 2015, absent congressional action to the contrary. Counsel should familiarize themselves with the rule changes now, as some courts have started to implement the amendments or are looking to the amendments to resolve current discovery disputes.

MCC: How do the revisions to Rule 26(b) impact the scope of discovery?

Brennan: Information is discoverable under revised Rule 26(b)(1) if it is relevant to a party's claim or defense and proportional to the needs of the case. As to the first aspect, the definition no longer includes language authorizing the court to "order discovery of any matter relevant to the subject matter involved in the action" or to grant discovery "reasonably calculated to lead to the discovery of admissible evidence." Parties have frequently relied upon the soon-to-be-stricken language to obtain additional discovery. As to the second aspect, the amendment restores the proportionality factors to their original place in Rule 26 and emphasizes that parties have the obligation to consider proportionality in all aspects of discovery.

MCC: Is the emphasis on proportionality in Rule 26(b) a new concept? How will proportionality be measured?

Facciola: It's not a new concept. Indeed, the provisions with reference to proportionality have been a part of the federal rules for a long time. In the present formulation, the rules on proportionality are in a section of Rule 26 that speaks to the court's ability to narrow the scope of discovery – for example, with a protective order. The rule has always stated that even discovery of relevant information can be interdicted if its cost is greater than its utility.

What the draftspersons of the new rules did was to bring proportionality to the fore as part of the very definition of permissible discovery. Also, notice how the words "amount in controversy" follow "importance of the issues at stake," which tries to capture the idea that even when there may not be an amount in controversy, the lawsuit still may involve crucial issues, such as in discrimination cases or those involving the First Amendment. The point is to make sure that we don't just look at dollars. Proportionality is now at the very center of the definition of discovery. That's crucial.

AT A GLANCE

For a summary of FRCP amendments, see page 48.

MCC: Is the emphasis on proportionality overly restrictive for plaintiffs?

Facciola: I don't think so. We'll have to see how it plays out. This has been part of the federal rules for a long time, and it has not inhibited discovery. A much more crucial thing that happened to the rules is the elimination of certain language. Over the years, the words "reasonably calculated to lead to the discovery of admissible evidence" became, in the minds of many people, including judges, the definition of discovery. Those words have now been eliminated. So the scope of discovery now refers to information that is "relevant to any party's claim or defense *and* proportional to the needs to the case." It is a very significant modification. The amendment, I have said on several occasions, in my view, is about as significant as any change in this rule since the enactment of the federal rules in 1938. Only time will tell whether I'm right or wrong.

MCC: The amendment to Rule 26(b) removes the sentence, "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." How will this change impact discovery disputes?

Rowland: I don't think we know yet what the impact will be on discovery disputes. What's interesting is when you read some of the commentary, when the Committee proposed removing that sentence, people wrote in and said, "This is the bedrock of the American discovery system." The Committee said, "No, actually this is not the bedrock of the system." That is exactly the point. This sentence was added to the rules, I believe, back in 1983, to make the point that evidence did not have to be admissible to be discoverable. That was the only reason that the sentence was added. It was not meant to define or broaden the scope of discovery.

> *Counsel should evaluate potential battlegrounds before litigation strikes.*
> — *Jennifer A. Brennan*

Personally, I think that this change has the potential to shift the scope of discovery significantly because it is so often cited as the basis to allow discovery. The fact that the Committee took it out of the rule could be a very powerful argument for lawyers for narrowing the scope of discovery.

MCC: The revisions to Rule 37(e) were heavily debated and arguably the most controversial. How do the amendments change the current rule?

Facciola: They became less controversial as time went by and the Committee made its modifications. The new rule does a lot of things, but, most crucially, it creates a national standard for the imposition of sanctions. Before this rule, the power to impose sanctions for the loss of evidence (since it was not covered by the federal rules) resided in the court's inherent authority, which the court could shape to meet the demands of an individual case. As a result, we had dramatic differences among the circuits as to the proper rule. This cabins that inherent authority with a rule that applies universally across the country.

Two other aspects of the rule jump off the page. The first is the requirement of showing prejudice from the loss of information, and the second is the division of the universe of sanctions into two categories. Under the first subsection of the rule, if there has been a showing of prejudice, the court "may order measures no greater than necessary to cure [it]." If the court wishes to impose the three specified sanctions in subsection two – giving an adverse jury instruction, entering a default judgment or exercising the nuclear option of dismissing the action – the court must find "that the party acted with the intent to deprive another party of the information's use in litigation" when it caused the information to be lost. So we now have, in part two of the new rule, a severe limitation on the court's preexisting inherent authority to impose sanctions. The only sanctions that are permitted are the ones permitted by this rule, and those three specified in subsection two are available *only* upon proof of an intent to deprive another of the information's use in litigation. Under subsection one, if there is no prejudice because you can get the information from another source, the court's powers are exhausted. If

there is prejudice, then the court's first obligation is to see if there are measures that are no greater than necessary to cure the prejudice. However, if this is a situation where it has been an intentional spoliation, in other words, somebody did something to make sure this stuff disappeared, then the court has a legitimate basis for imposing the three very serious sanctions in subsection two.

MCC: Who has the burden to prove prejudice or the intent to deprive another party of information?

Facciola: The answer is very nuanced. In the Advisory Committee's Notes, the court, in the exercise of its discretion, has to figure out how to determine the significance of the loss of information. There may be certain situations where it is unfair to impose that burden on the person victimized by the loss, but there are other situations where it may not be unfair. The rules do not permit an absolute reading of who has that burden, at least according to the Advisory Committee's Notes.

MCC: Rule 37(e)(1) grants the authority to order curative measures if prejudice is shown due to the loss of information. What are some examples of curative measures?

Brennan: What I find interesting is that curative measures do not appear to include restoration of data from backup tapes or other data archives. This is because the court may award measures to offset prejudice under subsection one only after it has made an initial determination under Rule 37(e) that information should have been preserved, it has been lost because a party failed to take reasonable steps to preserve, *and* the information "cannot be restored or replaced through additional discovery." The court's power to order the restoration is derived from Rule 16 and Rule 26(b) and is subject to considerations of proportionality.

MCC: What are the anticipated changes as a result of the new Rule 37(e)? Will the rule bring about uniformity among the circuit courts?

Facciola: That's the exact purpose of the rule, but whether that uniformity happens remains to be seen. An earlier version required a balancing of specific factors. It was terribly complicated. This rule is interesting in its simplicity. There's still discretion, and the need to interpret the words, particularly what it means in the preface to Rule 37(e) to take "reasonable steps" to preserve information. That will be informed by what we have learned from more than 10 years of electronic discovery. Nobody is held to a standard of perfection; it's a standard of reasonableness. That becomes very important because the size of the data we are accumulating is almost beyond comprehension.

> *I hope the change to Rule 34 will lead to efficiency and cost cutting.*
> *— Hon. Mary M. Rowland*

MCC: Are the amendments to Rule 37(e) consistent with, or a departure from, case law from the 7th Circuit?

Rowland: This has been the rule in the 7th Circuit for some time – that there has to be a showing of bad faith before an adverse inference arises. That's true in several other circuits: the 1st, 4th, 5th, 8th and 10th. For people who are in circuits where bad faith has been required, this rule change will not have much impact on their practice. I'm pleased that there's going to be one consistent rule.

MCC: What changes are being made to Rule 34? What are the benefits of this rule change?

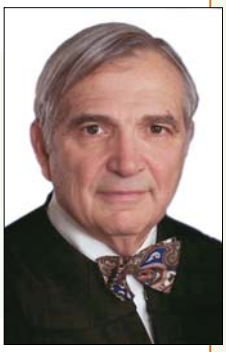
Rowland: I know everyone's talking about proportionality, but the change to Rule 34 is my favorite change. When a party is stating an objection – parties list lots of objections to document requests, as they're entitled to do – they have to say whether or not any documents are being withheld based on the objection. I am so happy about this rule, which I hope will lead to efficiency and cost cutting. After the lawyers do their jobs and states all the objections they feel need to be made, they will put in one sentence at the bottom that most often will say, "Even though I've stated all these objections, I'm not withholding any documents behind these objections." I'm hoping we will see a real decrease in motion practice because the lawyer who receives the objections will know that, "Okay, objections are on the record. That's fine, but I'm not missing out on any documents."

MCC: Will parties take advantage of the option to serve discovery prior to the Rule 26(f) conference?

Rowland: It will be case by case. There will definitely be cases where they will. I can imagine cases on my docket right now where because of the stakes in the case, because of the lawyers in the case, because of the amount of work to be done in the case, perhaps because of the dates that the trial judge has set in the case, yes, the parties will definitely use the earlier deadlines that are now at their disposal. But my sense is the majority of the cases will move at the pace we are used to, at least initially while people become accustomed to the change in the rules.

MCC: Do the amendments put a greater emphasis on judicial management? Will this change the manner in which discovery is addressed?

Rowland: If you read not so much the amendments but the commentary, and the commentary on the commentary, everybody says there should be more judicial involvement and more hands-on, consistent judicial case management earlier in the case. I think this, too, is case by case. There are lawyers who know their case – they know a lot more about their case than I ever will – they're running it well, they're efficient, they're getting it done, they're working together, they're cooperating. Then there are the cases that are messy, for whatever reason, often involving electronic discovery, and they need a lot more supervision. Certainly these rules, and the commentary around the rules, demand that the court be much more involved in the management of the discovery process. Different judges will do that differently. As magistrate judges, we have a particular role to play. We are looking forward to taking on that challenge.



> *Proportionality is now at the very center of the definition of discovery.*
> *— Hon. John M. Facciola (Ret.)*

MCC: Will the amendments solve today's e-discovery problems? Or are other changes also needed?

Facciola: They should be looked at in consonance with the 2006 amendments, which grapple with the arrival of electronic discovery. When we look at both of them, I think they show a great sensitivity to the issues. I can't think of a topic under electronic discovery that has now not been dealt with comprehensively by those two sets of rules. What are the consequences? We can reasonably hope that whatever the consequences will be, the committee will achieve its intention of getting the cost of electronic discovery closer to the utility of electronic discovery. It's quite clear that everybody who's involved in this process, or knew about it, is deeply concerned about the cost of electronic discovery – that dollars can be spent, and when the dust settles what has been found is not all that significant. We can hope that the rules will meet that crying need.

MCC: How can corporations and counsel prepare for the rule changes?

Brennan: The first step is to read the rules, particularly the Advisory Committee Notes, which highlight the beneficial purpose of each amendment. Corporate counsel and outside counsel should then evaluate potential battlegrounds brought about by the new rules before litigation strikes. As an example, a likely area of dispute will be the determination of what constitutes "reasonable steps" under Rule 37(e) to preserve data when there is anticipation of litigation. Corporations should examine existing records management policies, assess where data is being stored and how long it is being retained, and evaluate the state of compliance with business and regulatory requirements. A proportionate and well-documented information governance protocol with specific records retention and records disposition guidelines that is consistently applied will help thwart a spoliation allegation.

MCC: What advice do you have for counsel about electronic discovery and the amendments?

Facciola: It is crucial for counsel to go to the meet–and-confer required by Rule 26(f) ready to negotiate in a serious and effective manner what the scope of the discovery is going to be. That discussion can't be a very serious one if everybody asks for everything. Remember, Rule 1 has been amended to require that the parties and counsel are subject, as much as the judges, to the obligation that the rules impose to have a just, speedy and efficient way of resolving disputes. So the first advice for counsel is to sit down with the client and figure out what the client has and how it can be managed or how it can be produced in the most efficient way possible. Counsel must know the technology sufficiently to make judgments as to what tools are available to assist in that process. And then counsel must meet with the other side and engage in a meaningful negotiation. I can't emphasize too strongly that counsel has to know the technology. You can't get up in a court and say, "Oh, judge, we can't do that because it's going to cost x millions of dollars" when you don't know for a fact that it's true. And if you're foolish enough to say that and you're proven wrong, you'll pay a heavy price because your credibility in the court will be shot. And if you're foolish enough to do that, I don't know what to tell you except you might want to look into another profession.

Continued on next page

FRCP Amendments at a Glance

Rule	Category	Amendment
1	Proportionality	Emphasizes that courts and parties should use the rules to secure just, speedy, inexpensive litigation.
26(b)(1)	Proportionality	Defines scope of discovery and proportionality factors; deletes phrase "appears reasonably calculated to lead to the discovery of admissible evidence."
26(b)(2)(C)(iii)	Proportionality	Encourages court to use R. 26(b)(1) to define scope of discovery; deletes proportionality factors.
26(c)(1)(B)	Case Management - Costs	Express recognition that protective orders may allocate discovery expenses.
26(d)(2)	Case Management - Discovery	Permits R. 34 requests to be sent prior to initial R. 26(f) conference.
26(f)(3)(C)-(D)	Case Management - Privilege and Preservation	Requires discovery plan to address views on preservation of ESI and whether parties request FRE 502 order.
34(b)(2)(A)	Case Management - Discovery	Requires response to R. 34 requests sent under R. 26(d)(2) within 30 days after R. 26(f) conference.
34(b)(2)(B)	Case Management - Discovery	Requires objections with specificity; permits production rather than inspection; requires identification of reasonable date of production if not producing at time requested.
34(b)(2)(C)	Case Management - Discovery	Requires indication of whether any documents will be withheld based on specified objections.
37(e)	Preservation	Outlines intitial considerations of whether information should have been preserved in anticipation or conduct of litigation, if party failed to take reasonable steps to preserve the information, if information was lost as a result, and if it cannot be restored or replaced by additional discovery.
37(e)(1)	Preservation	If R. 37(e) is satisfied and upon a finding of prejudice, permits curative measures.
37(e)(2)	Preservation	If R. 37(e) is satisfied and *only* upon finding of intent to deprive, permits presumption that lost information was unfavorable, adverse inference instruction, or dismissal/default judgment.

Jennifer A. Brennan
A director in the Washington, D.C. office of iDiscovery Solutions.
jbrennan@idiscoverysolutions.com

Hon. Mary M. Rowland
United States Magistrate Judge currently serving in the United States District Court for the Northern District of Illinois.

Hon. John M. Facciola (Ret.)
Retired United States Magistrate Judge who formerly served in the United States District Court for the District of Columbia.