Proposed E-Discovery Amendments Are Only the First Step

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Apple Inc. introduced the iPad in 2010, creating challenges for proper data preservation of potentially discoverable information for litigation purposes. This is the same year the Conference on Civil Litigation was held at Duke University where the committee assigned to review the federal rules on e-discovery decided that amended rules were needed, because "many entities" are "spending millions of dollars preserving ESI for litigation that may never be filed" and "over-preserve ESI out of fear that some ESI might be lost, their actions might with hindsight be viewed as negligent, and they might be sued in a circuit that permits adverse inference instructions or other serious sanctions on the basis of negligence."

Six iPad versions and four years later, the U.S. Supreme Court is poised to approve these amendments. In the interim, spoliation claims rose, sources and volumes of electronic data expanded exponentially, and companies facing the prospect of litigation continued their conservative and costly over-preservation, for fear of crippling spoliation sanctions in litigations.

Will the new Federal Rules give parties the comfort level they need to design reasonable data management policies, as well as help ensure that "the party seeking relief has some obligation to make a showing of relevance and eventually prejudice, lest litigation become a 'gotcha' game"? This was the concern expressed by Judge Shira Scheindlin in her 2010 opinion, Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities in the U.S. District Court for the Southern District of New York.

Unfortunately, these amendments are unlikely to alter current practices anytime soon. Even the judiciary is not optimistic. A just-released 2015 survey by Exterro asked 22 federal judges whether "[u]pcoming amendments to the FRCP will help solve many problems that currently occur in e-discovery today." An underwhelming 14 percent completely agreed, while only 43 percent "somewhat agreed." The remaining 43 percent either did not agree, or just did not know.

It is necessary to compare the current rule with the proposed changes to understand this tepid reaction. Current Federal Rule 37(e) provides that, "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide ESI lost

as a result of the routine, good-faith operation of an electronic information system." While this sounds reasonable, circuit courts developed different standards for when serious sanctions could be levied—some require negligence, others require bad faith.

The proposed Rule 37(e)(1) states that, if a party failed to preserve information that "should have been preserved," then the court may a. permit additional discovery, order curative measures, or order the party to pay the reasonable expenses, including attorney fees, caused by the failure; and b. impose any sanction listed in Rule 37(b)(2)(A) or give an adverse-inference jury instruction, but only if the court finds that the party's actions: 1. caused substantial prejudice in the litigation and were willful or in bad faith; or 2. irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation." The requirement of willfulness or bad faith resolves the circuit court split as to whether to apply the standard of bad faith or mere negligence.

Rule 37(e)(2) identifies factors the courts should consider in assessing a party's conduct, which includes the reasonableness of the party's efforts to preserve and the proportionality of the preservation efforts to any anticipated or ongoing litigation.

Despite the rule's intent to reduce the risk of serious sanctions, most companies likely will continue to exercise an over-abundance of caution in preservation for various reasons.

First, "prejudice" is not defined and is susceptible to inconsistent and ad hoc interpretation. The party claiming harm has the intuitive argument that they do not know what is missing and are thereby prejudiced, while the supposed offending party has the challenge of proving that information that no longer exists is irrelevant. Further complicating this is that the rules are silent as to who has the burden to prove prejudice.

Second, while having an opportunity to cure seems, on its face, to be a welcome alternative to sanctions, curative measures also can be debilitating. For example, restoring voluminous back-up tapes is expensive, thus incentivizing companies to incur the front end preservation costs, rather than risk even more costly restoration.

Third, what constitutes "reasonableness" of efforts to preserve is in the eye of litigants, who will have widely varying views on what is reasonable.

Fourth, even if these amended rules work as intended, they will have no bearing on state courts unless and until lawyers successfully advocate for consistency with federal standards. Currently, some state courts recognize either the tort of intentional spoliation or negligent spoliation, or in some cases, both. Companies will establish policies based on the broader law in the various courts in which they can be sued, not just the federal courts.

Finally, new technologies will continue to outpace the glacial pace of rule changes, leaving parties continuing to develop long range broad policies designed to capture an ever changing technological landscape that they cannot possibly project accurately. After all, Apple's smartwatch is coming, a foreign concept just five short years ago at the Duke Conference.

All of this will leave parties still over-preserving, and will leave opportunistic opponents still probing for weaknesses in preservation, with the intent of exploiting them in litigation regardless of their relationship to the merits of the action. The proposed amendments are a

positive step, but until there are consistent rules and application in all courts, thereby blunting the "gotcha" tactics, it is only the first of many steps needed to allow for reasonable document management policies.