

UNFINISHED BUSINESS: A WISH LIST FOR NEW FRCP AMENDMENTS

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The e-discovery amendments to the Federal Rules of Civil Procedure (FRCP) became effective two years ago with great expectations. And with good reason. The amendments included provisions addressing many of the pain points in discovery—for example, previously inconsistent and sometimes unfair sanctions standards for preservation failures and persistent problems with overly broad and disproportionate discovery.

The 2015 amendments had the potential to be transformative. So far, they have succeeded in part. Ambitious as they were, the amendments left unresolved several serious

problems. In our view, important work remains. So, here is our “short list” for a new set of e-discovery amendments to the FRCP. These changes would make discovery more efficient and eliminate inconsistencies and unfairness. They would also advance the objectives of Rule 1 by facilitating “the just, speedy, and inexpensive determination” of litigation.

The Rules 34 and 45 Circuit Split

Courts in different circuits have taken divergent approaches to the meaning of “possession, custody and control” under Rules 34 and 45. While the split itself is problematic, the “practical ability

test” in some circuits is particularly troubling.

Under the “practical ability” test, a responding party is responsible for preserving and producing discoverable information that it has the “practical ability” to obtain, even if possessed by a third party. It has been criticized as vague, speculative, and making parties responsible for the discovery failures of third parties.

For example, some courts have held the test is satisfied if the responding party could have obtained the documents “by picking up the telephone.” Such a determination would often be speculative and could lead to an almost unlimited

reach of preservation and production duties.

In its Commentary on Possession, Custody or Control, The Sedona Conference recently called for elimination of the “practical ability” test. It’s on our wish list as well. We would amend Rules 34 and 45 to incorporate the alternative “legal right” approach, under which a party must have actual possession of or a legal right to obtain information to be responsible for its preservation and production.

Remaining Holes in the Sanctions Regime

Next on our wish list: Closing the holes that remain in the sanctions regime following the 2015 amendment to Rule 37(e).

Rule 37(e) implemented a new framework for imposing sanctions arising from the loss or destruction of ESI that a party had a duty to preserve. Yet, three holes in that framework have emerged: (1) the rule’s language does not foreclose sanctions under inherent authority, (2) it only applies to ESI, and (3) it does not completely eliminate

reliance on pre-amendment case law.

First, the recent re-emergence of “inherent authority” as a source of sanctions has come as a surprise to many. The Committee Note states that the rule “forecloses reliance on inherent authority or state law to determine when certain measures should be used.”

Yet, because the language of the rule itself does not expressly proscribe the use of inherent authority, some courts have disregarded that guidance. For example, in *Cat 3 LLC v. Black Lineage Inc.*, the court reasoned it could still impose sanctions pursuant to its inherent authority if a party’s apparent alteration of emails could not be addressed by Rule 37(e).

Since then, some courts have found that Rule 37(e) forecloses sanctions under inherent authority, while others have held the opposite. Whether a particular court chooses one approach over the other appears to be a roll of the dice. We would move the language that inherent authority is foreclosed from the Committee

Note to the rule itself to dispel this confusion.

Second, the scope of Rule 37(e) should be expanded so it applies to all evidence, not just ESI (as is presently the case). The thinking in applying Rule 37(e) only to ESI was that most of the problems it addressed were associated with exponential growth of ESI. By excluding other forms of evidence from the rule, however, courts and litigants have had to apply, side by side, two sets of inconsistent standards to sanctions motions involving both ESI and paper documents, with potentially inconsistent results. We see no reason why different standards should apply here.

Third, either the rule or the Committee Note should be updated to confirm that case law predating the 2015 amendments is no longer applicable. The Committee Note states the amended rule was intended to reject cases such as *Residential Funding Corp.* that authorize the most serious sanctions for negligent conduct. Yet, a disconcerting trend has emerged in which

courts have been applying other pre-December 2015 sanctions case law that is, in many cases, inconsistent with amended Rule 37(e).

Reliance on pre-amendment case law inevitably leads to inconsistent decisions that undermine a uniform national standard and weaken the rule's provisions. Some courts have recognized as much, going so far as to sanction counsel who have cited pre-amendment decisions. Others, however, have relied on pre-amendment case law to issue decisions with questionable reasoning.

Incorporate Cooperation and Sedona Principle 6

Last on our wish list is incorporating into the rules both a call for parties to be cooperative and, as an important clarification of the limits of cooperation, Sedona Principle 6.

Cooperation is best understood as sharing information and being willing to discuss the discovery process with the opposing party. Sedona Principle 6, for its part, provides that responding parties “are best situated to evaluate the

procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information.”

A proposed cooperation requirement in Rule 1 did not make it into the 2015 amendments due to concerns that imposing a duty to cooperate would generate collateral litigation. The Committee Note includes a reference to cooperation, stating that effective advocacy is “consistent with—and indeed depends upon—cooperative and proportional use of procedure.” But cooperation does not appear in the rule.

Calls for cooperation have endured, and we believe that it may be time for an amendment that encourages—but does not require—cooperation. Concerns over collateral litigation could be addressed by language like that already appearing in the Committee Note to Rule 1 that the amendment “does not create a new or independent source of sanctions.”

Any such amendment, though, must be tempered by an acknowledgment that cooperation goes both ways—for

example, the requesting party cannot make unreasonable and burdensome demands under the guise of “cooperation.” Moreover, there are limits to cooperation, including that the requesting party cannot dictate or demand involvement in the process and methods the responding party employs.

That is what Sedona Principle 6 addresses, i.e., that responding parties have the right to control how they will address their preservation and production obligations while exploring cooperative solutions with requesting parties.

That's our wish list. With these revisions, we believe the goal of the 2015 amendments to address the worst trouble spots in discovery could be largely fulfilled.

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