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Gibson, Dunn & Crutcher attorneys Jennifer H. Rearden and Goutam U. Jois examine recent cases under amended Rules 37(e) and 26(b)(1) and highlight certain trends that have emerged.

Trends Under Amended Federal Rules of Civil Procedure 37 and 26

By Jennifer H. Rearden and Goutam U. Jois

Introduction

On December 1, 2015, several highly publicized amendments to the Federal Rules of Civil Procedure went into effect. In his 2015 Year End Report, Chief Justice Roberts described these changes as designed ''to address the most serious impediments to just, speedy, and efficient resolution of civil disputes.''

Two rules in particular, Rules 37(e) and 26(b)(1), received substantial attention. Arguably, amended Rule 37(e), which provides for sanctions for failures to preserve electronically stored information (''ESI''), was the most anticipated of the amendments.

The other significant change was to Rule 26(b)(1), regarding the scope of discovery. That rule was amended to make explicit, among other things, that any discovery sought must be ''proportional to the needs of the case.''

Courts around the country seem to be applying amended Rule 37(e) consistent with its terms. Notably, however, some cases have continued to refer to courts' inherent authority, which the new rule was intended to foreclose.

Somewhat surprisingly, amended Rule 26(b)(1) also seems to be having a substantial impact. Although the new rule explicitly emphasizes proportionality for the first time, the earlier version of the rule already included most of the factors for evaluating proportionality; pre-amendment, courts certainly could have limited discovery on the basis of proportionality.

Thus, an amendment that might have been perceived as simply a change in form does, in fact, appear to be having considerable substantive effects.

Rule 37(e)

As explained by the Advisory Committee, prior to the amendment of Rule 37(e), ''[f]ederal circuits ha[d] established significantly different standards for imposing sanctions or curative measures on parties who fail to preserve electronically stored information.''

Those varying standards had ''caused litigants to expend excessive effort and money on preservation in order to avoid the risk of severe sanctions.''

The new Rule 37(e) ''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.''

Seeking Uniformity. Perhaps most important, the amended rule ''is designed to provide a uniform standard in federal court for use of . . . serious measures [such as case termination or an adverse inference jury instruction] when addressing failure to preserve electronically stored information.''

Specifically, amended Rule 37(e) requires a showing that the party that lost the ESI had ''the intent to de-

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prive another party of the information's use in the litigation.''

In contrast, some courts previously had ''authorize[d] the giving of adverse-inference instructions on a finding of negligence or gross negligence.''

Recent Case Law. A decision in *Nuvasive, Inc. v. Madsen Med., Inc.*, illustrates the impact of this amendment. In *Nuvasive*, the court previously had granted in part the defendants' motion for an adverse inference jury instruction on account of NuVasive's loss of evidence, even though NuVasive had not intentionally failed to preserve the documents at issue. *Nuvasive, Inc. v. Madsen Med., Inc.*, 2016 BL 20440, at *1 (S.D. Cal. Jan. 26, 2016).

Post-amendment, NuVasive moved for reconsideration in light of the new rule's requirement that the responding party must have intended ''to deprive another party of the information'' before such a sanction could be issued. *Id* at *2-3.

The court agreed, reasoning that,

> ''[i]n its prior orders, the Court did not make any finding that NuVasive *intentionally* failed to preserve the text messages so that Defendants could not use them in this litigation. . . . Therefore, under Rule 37(e), as amended, it would not be proper for the Court to give the adverse inference instruction.'' *Id* at *2-3 (emphasis in original).

In analyzing a spoliation motion under both the old and new rules, *NuVasive* perhaps best illustrates the different results that may issue (and already have issued) under the latter.

Court's Discretion. The decision in *Feist v. Paxfire, Inc.*, 2016 BL 282126 (S.D.N.Y. Aug. 29, 2016), illustrates the court's discretion in tailoring curative measures. There, the plaintiff deleted her internet browsing history and tracking cookies, which would have shown whether the defendant was responsible for redirecting the plaintiff's web browser unlawfully. Her computer later crashed, and the deleted information was not recoverable.

The defendant moved to dismiss the relevant count of the complaint as a sanction, on the ground that the history and cookies could have established that it was not responsible for any redirection. *Id.* at *1-2.

Although the court found that the plaintiff ''reasonably should have known that evidence of her internet history, including her cookies, would be relevant,'' and that she ''admitted running the cleaner program,'' the court concluded that she did not act ''intentionally to deprive Paxfire of all of the information'' and was not ''at fault for her computer crashing.'' *Id.*

The court undertook to ''find a remedy 'no greater than necessary' to cure the prejudice of the loss of information'' and concluded that dismissal was not warranted.

Instead, the court precluded the plaintiff from ''arguing that statutory damages are to be awarded in this case for specific redirections, and specific internet searches,'' because the cookies would have helped to determine ''which [specific] redirections [we]re attributable to Paxfire's conduct.'' *Id.* at *7.

The court further precluded the plaintiff from ''proffer[ing] any evidence of specific violations in its motion for summary judgment, or at trial.'' *Id.*

More On Prejudice. As in *Feist*, other courts have noted the new rule's ''prejudice'' requirement.

Previously, a party arguably could have been sanctioned for the loss of evidence even where its adversary was not harmed. Now, courts appear to be following the amended rule in rejecting such outcomes.

In *Best Payphones, Inc. v. City of New York*, for example, the court denied the defendants' motion for sanctions because ''Defendants have not shown prejudice from the loss of any emails . . . .'' *Best Payphones, Inc. v. City of New York*, 2016 BL 61617, at *3 (E.D.N.Y. Feb. 26, 2016).

Similarly, in *Living Color Enterprises, Inc. v. New Era Aquaculture, Ltd.*, 2016 BL 92475 (S.D. Fla. Mar. 22, 2016), the court denied sanctions where the plaintiff was not prejudiced by the defendant's automatic deletion of text messages.

Courts are invoking the new Rule 37(e), though questions about inherent authority may remain.

More Paths to Sanctions. Rule 37(e) may not be the only path to sanctions, however. The Supreme Court has held that a federal court has the ''inherent authority'' to sanction bad faith conduct. *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991).

Although the Advisory Committee Note states that amended Rule 37(e) ''*forecloses reliance on inherent authority* or state law to determine when certain measures should be used,'' the text of the amended rule is silent on the issue.

In *CAT3, LLC v. Black Lineage, Inc.*, 2016 BL 7342 (S.D.N.Y. Jan. 12, 2016), the defendants contended, among other things, that the plaintiffs had altered certain e-mails. Invoking amended Rule 37(e), the court found that the plaintiffs had intentionally destroyed the content of those e-mails and granted the defendants' motion for sanctions.

The court also precluded the plaintiffs from relying on the altered version of the e-mails and ordered them to pay defendants' costs incurred in seeking sanctions. *Id* at *13.

Of note, the court observed that, even ''[i]f the plaintiffs were correct that [new] Rule 37(e) is inapplicable here, relief would nonetheless be warranted under the Court's inherent power.'' *Id.* at *12.

As to the rule's ''foreclose[ing]'' of inherent-authority sanctions, the court cited *Chambers* and stated that the Advisory Committee's language only ''means . . . that a court could not rely on one of those other sources of authority to *dismiss* a case as a sanction for merely negligent destruction of evidence, as would have been the case'' previously. *Id.* at *8 (emphasis added).

Overall, these cases show that courts are invoking the new Rule 37(e), though questions about inherent authority may remain.

Rule 26(b). Amended Rule 26(b)(1) provides:

> ''[p]arties 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* . . . .'' Fed. R. Civ. P. 26(b)(1) (emphasis added).

Though the italicized language was added as part of the 2015 amendments, the notion of proportionality in discovery is not new. As the Advisory Committee Note

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explains, ''[t]he considerations that bear on proportionality''—which are enumerated in the remainder of the sentence, following the italicized portion above—''are moved from present Rule 26(b)(2)(C)(iii), slightly rearranged and with one addition.'' The Advisory Committee further explains that ''[r]estoring the proportionality calculation to Rule 26(b)(1) does not change the existing responsibilities of the court and the parties to consider proportionality . . . .'' *Id*. Instead, ''[t]he present amendment restores the proportionality factors to their original place in defining the scope of discovery.'' *Id*.

Although the amended rule ''does not change the existing responsibilities of the court and the parties,'' recent cases seem to be focusing much more on proportionality.

In *Noble Roman's, Inc. v. Hattenhauer Distrib. Co.*, 314 F.R.D. 304, 309 (S.D. Ind. 2016), the court granted a motion for a protective order. Citing the factors from Rule 26(b)(1), the court held that the defendants' assertions ''that all of its deposition topics and document requests are 'relevant' '' are ''not good enough,'' because the defendants had not ''demonstrate[d] that the discovery is in any way proportional to the needs of this case.'' *Id* at 311.

Similarly, in a slander case, the plaintiff served a subpoena requesting LexisNexis Comprehensive Person Reports about himself and others, including nonparties. The court held that, ''[a]fter considering the Rule 26(b) factors, it is clear that the information sought in the subpoena is disproportionate to the needs of this case,'' and granted the motion to quash the subpoena. *O'Boyle v. Sweetapple*, 2016 BL 38979, at *6 (S.D. Fla. Feb. 8, 2016).

In an ERISA case, the court denied a motion to compel, holding that the ''burden that the requested discovery''—records from other benefits coverage decisions—''would place on [defendant] outweighs the value of this information to [plaintiff].'' *Rickaby v. Hartford Life & Accident Ins. Co.*, 2016 BL 127945, at *4 (D. Colo. Apr. 21, 2016). The court ''specific[ally] consider[ed] . . . the recent amendments to [Rule 26(b)(1)],'' including ''the principles of proportionality.'' *Id.*

The court's description of proportionality in *Black v. Buffalo Meat Serv., Inc.*, 2016 BL 265006 (W.D.N.Y. Aug. 16, 2016), is also illustrative. There, the plaintiff filed a motion to compel responses to discovery requests.

In response, the ''defendants contend[ed] that (under the recently amended Rule 26(b)(1)) they are disproportionate to plaintiff's claims and the issues in this case.'' The court rejected the plaintiff's argument that her requests were ''proportional . . . because they are relevant to her claims.'' Rather, ''[r]elevance under Rule 26(b)(1) is now tempered by proportionality; *particular items may be relevant but discovery to obtain them may not be proportionate for that case.*'' *Id.* at *7 (emphasis added).

The court held that the defendants' original production was ''sufficient and proportionate given the nature and scope of this action,'' and denied the plaintiff's motion. *Id.*

Because the proportionality factors have been part of Rule 26 for years, one might reasonably have expected the new Rule 26(b)(1) to have limited impact. But as these cases demonstrate, courts are relying on the new rule to limit discovery, including relevant discovery, due to its lack of proportionality with the needs of the case.

Conclusion

Commentators—ourselves included—focused extensively on the potential effect of the new rules before they were implemented. Now, we are beginning to see how these rules are playing out in practice.

A comprehensive review is beyond the scope of this article, but it appears that courts are regularly invoking amended Rules 37(e) and 26(b)(1).

In the sanctions context, some questions remain, particularly in connection with courts' reliance on inherent authority.

For its part, the concept of proportionality, while not new, may rejuvenate Rule 26's guiding principles.

As always, the details will vary with the facts of each case, but it seems fair to say that the new rules are shaping judges' and litigants' approach to discovery disputes.

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