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Electronic Discovery

K. Alex Khoury

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by K. Alex Khoury*

The most significant developments in electronic discovery (E-Discovery) law in the Eleventh Circuit in 2015 were the latest amendments to the Federal Rules of Civil Procedure (Amendments), which went into effect on December 1, 2015. As with the last round of amendments in 2006, the 2015 Amendments primarily addressed the rapidly expanding and evolving practice of E-Discovery. Some of the amendments are minor tweaks to existing rules that will have little or no impact on current precedent. Other amendments introduce entirely new rules designed to give the courts and the parties new tools to corral the beast that is E-Discovery. There is debate over whether the Amendments will result in any meaningful changes in federal civil practice. Questions about the efficacy of the Amendments, however, will not be answered until next year's survey period, when the first wave of district court opinions applying the new rules start to come down.

I. E-DISCOVERY AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

The 2015 Amendments are underpinned by a familiar theme—the expense of discovery impedes the resolution of disputes on their merits. This same mantra was one of the driving considerations for the adoption of the Federal Rules in 1938.[1] Prior to the Federal Rules, there was no consistent mechanism to require a party to exchange evidence with an opposing party.[2] Wealthy parties could devote more resources to

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* Partner at Balch & Bingham LLP, Atlanta, Georgia. Adjunct Professor of E-Discovery, Walter F. George School of Law, Mercer University. Georgia College & State University (B.S., 1994); Mercer University, Walter F. George School of Law (J.D., cum laude, 2003). Member, State Bar of Georgia.

The author would like to thank Sean Leonard for his invaluable assistance in preparing this Article. Sean is an E-Discovery specialist at Siemens.

1. John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L. J. 547, 556 (2010).

2. *Id.* at 555.

discovery and thus have an unfair advantage in the "trial[] by ambush" environment of the day.[3] That imbalance, it was argued, dissuaded less affluent parties from pursuing meritorious claims.[4] To level the playing field, the drafters adopted rule-based discovery.[5]

Seventy-seven years later, the exponential growth of data creation and retention is driving rising discovery costs and delaying the determination of claims to the point that even wealthy litigants are reticent to see their claims through to trial.[6] Thus, the Civil Rules Advisory Committee (the Committee) set to work once again with the goal of making litigation accessible to all. As shown below, the Committee used three overriding strategies to accomplish the goal: (1) restraining the scope of discovery; (2) encouraging active case management by the courts; and (3) encouraging more cooperation between the parties.[7]

A. Rule 1 — Aspiration for Cooperation

The drafters amended Rule 1[8] to set the tone for the rest of the 2015 Amendments. Prior to amendment, the rule admonished that the Federal Rules were to be "construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."[9] Rule 1 was silent, however, as to who was responsible for construing and administering the rules to obtain these lofty goals.[10] The Committee Note following the 1993 amendment to Rule 1 clarified that the court and attorneys, as officers of the court, have the duty to administer the Rules for the just, speedy, and inexpensive determination of claims.[11] The 2015 Amendment makes clear the "court[s] and the parties" are responsible for using the rules to obtain just, speedy, and inexpensive results.[12] The Committee Notes provided that the drafters did not intend the amendment to Rule 1 to create any new obligations on the parties but rather intended to encourage the parties to cooperate in furtherance of the goals of Rule 1.[13]

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3. *Id.* at 556.
4. *Id.*
5. *Id.*
6. *Id.* at 567.
7. FED. R. CIV. P. 1 Advisory Committee's note to 2015 amendment.
8. FED. R. CIV. P. 1.
9. FED. R. CIV. P. 1 (2014).
10. *See id.*
11. FED. R. CIV. P. 1 Advisory Committee's note to 1993 amendment.
12. FED. R. CIV. P. 1.
13. FED. R. CIV. P. 1 Advisory Committee's note to 2015 amendment.

B. Rule 16—Early, Direct Communication

Rule 16[14] addresses case management by the courts. The intent of Rule 16 is "to encourage the active judicial management of the case development process."[15] The amendments to Rule 16 show a strong desire to get judges communicating with parties on E-Discovery topics earlier in the case.[16] This theme runs throughout the 2015 Amendments.

The first change to Rule 16 appears in subdivision (b)(1)(B), which previously allowed judges to conduct a scheduling conference "after consulting with the parties' attorneys and any unrepesented parties . . . by telephone, mail, or other means."[17] The Committee deleted the "by telephone, mail, or other means" language, noting that "[a] scheduling conference is more effective if the court and parties engage in direct simultaneous communication."[18] Under the new rule, scheduling conferences should "be held in person, by telephone, or by more sophisticated electronic means."[19]

Next, the Committee set about encouraging the court and the parties to engage in "direct simultaneous communication" earlier in the case.[20] Under the amended Rule 16(b)(2), the court must issue a scheduling order within the earlier of 90 days (formerly 120 days) after any defendant has been served with the complaint or 60 days (formerly 90 days) after any defendant has appeared.[21] Thus, new Rule 16(b)(2) lessens the maximum time the court has to issue its scheduling order by thirty days. However, the new Rule 16(b)(2) gives courts the discretion to extend the time for issuing a scheduling order for good cause.[22]

To get the court and the parties talking about E-Discovery, the Committee added three new items to the list of subjects that may be included in scheduling orders.[23] First, scheduling orders may now address the "preservation" of electronically stored information (ESI) in addition to its disclosure and discovery.[24] By encouraging the court and the parties to discuss preservation of ESI early in the case, the

14. FED. R. CIV. P. 16.
15. JAMES WM. MOORE ET AL., MOORE'S FED. PRACTICE ch. 16, at 16-1 (3d ed. 2016).
16. *Id.*
17. FED. R. CIV. P. 16(b)(1)(B) (2014).
18. FED. R. CIV. P. 16(b)(1)(B) Advisory Committee's note to 2015 amendment.
19. *See id.*
20. *Id.*
21. *Compare* FED. R. CIV. P. 16(b)(2) (2014), *with* FED. CIV. P. 16(b)(2).
22. FED. R. CIV. P. 16(b)(2).
23. FED. R. CIV. P. 16 Advisory Committee's note to 2015 amendment.
24. FED. R. CIV. P. 16(b)(3)(B)(iii).

Committee hopes to reduce the frequency of spoliation motions.[25] Second, revised Rule 16(b)(3) permits scheduling orders to include Federal Rule of Evidence (F.R.E.) 502 agreements.[26] F.R.E. 502 agreements allow parties to inadvertently produce privileged information without waiving the applicable privilege.[27] These types of agreements are essential in E-Discovery because they reduce the risk of privilege waiver in large document productions—a risk that significantly adds to the cost and delay of document reviews.[28] Third, the new Rule 16(b)(3) allows the court to require parties to request a conference with the court before filing discovery motions.[29] This addition encourages judges and parties to talk about discovery disputes before plunging into contentious motions practice.[30] All three additions to Rule 16(b)(3) encourage the court and the parties to discuss discovery concerns early in the case to reduce protracted and expensive motions practice later.

Looking deeper, the Committee amended Rule 16 to create opportunities for the court and the parties to reach agreement on E-Discovery topics before the parties become entrenched in discovery battles.[31] This type of "cooperation" is the most effective means of controlling the escalating costs and delays caused by E-Discovery and is in keeping with the spirit of Rule 1. Whether the courts and the parties will take advantage of these opportunities remains to be seen.

C. Rule 26—The Scope of Discovery Redefined

Rule 26[32] received some of the most significant, and controversial, changes of the 2015 Amendments. In particular, the amendment of Rule 26(b)(1) redefined the scope of discovery.

Amended Rule 26(b)(1) provides as follows:

> Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged

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25. FED. R. CIV. P. 16 Advisory Committee's note to 2015 amendment. The Committee's inclusion of "preservation" as a topic for inclusion in discovery plans and scheduling orders. *See* FED. R. CIV. P. 26(f)(3)(C) Advisory Committee's note to 2015 amendment. Collectively, these amendments encourage the court and the parties to define the scope of the duty to preserve early in the case rather than in spoliation sanctions motions later in discovery. *See* FED. R. CIV. P. 37(e) Advisory Committee's note to 2015 amendment.

26. FED. R. CIV. P. 16(b)(3)(B)(iv).

27. FED. R. EVID. 502.

28. FED. R. EVID. 502 Advisory Committee's note to 2007 amendment.

29. FED. R. CIV. P. 16(b)(3)(B)(v).

30. FED. R. CIV. P. 16 Advisory Committee's note to 2015 amendment.

31. *Id.*

32. FED. R. CIV. P. 26.

> 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.[33]

Put simply, the scope of discovery is now defined as any non-privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case.[34]

Proportionality is determined by examination of six factors, which, with the exception of the third factor—the parties' relative access to relevant information—are not new concepts.[35] The Federal Rules have used the proportionality factors to limit the scope of discovery for more than thirty years.[36] The factors first appeared in the 1983 amendments to the Federal Rules when the Committee inserted the following language directly into Rule 26(b)(1):

> The frequency or extent of use of the discovery . . . shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) 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.[37]

In the 1993 amendments, the Committee moved the proportionality factors into a newly created subdivision, Rule 26(b)(2), for "ease of

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33. FED. R. CIV. P. 26(b)(1).

34. *Id.*

35. *Id.* The third proportionality factor, relative access to the information, is an E-Discovery-inspired factor meant to consider the problems caused by asymmetry information, which can take several forms. FED. R. CIV. P. 26 Advisory Committee's note to 2015 amendment. In the Notes, the Committee specifically addresses what is commonly called "volume asymmetry," which exists when one party has far more discoverable information than the other party and, therefore, bears a far greater burden in discovery. *Id.* Although not mentioned in the Committee Notes, another type of asymmetry that could impact a court's proportionality analysis is knowledge asymmetry, which results when one party has disproportionately more knowledge about the existence or location of relevant data. *Id.*

36. FED. R. CIV. P. 26 Advisory Committee's note to 2015 amendment.

37. FED. R. CIV. P. 26(b)(1) (1983).

reference."[38] Finding courts did not employ the proportionality factors to limit discovery as robustly as anticipated, the Committee amended Rule 26(b)(1) in 2000 to add the line: "All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii)."[39] In 2006, the Committee moved the proportionality factors down in the rules again, this time to Rule 26(b)(2)(C), to make room for the newly created Rule 26(b)(2)(B) concerning information not reasonably accessible.[40] This drifting away of the proportionality factors from Rule 26(b)(1) may be one of the reasons courts and parties have not viewed the factors as an integral part of the scope of discovery.[41] The return of the proportionality factors to Rule 26(b)(1) in the 2015 Amendments is not a new limitation on the scope of discovery; it is an attempt to get the courts and the parties to recognize proportionality as the limit on discovery it was always intended to be.[42]

Although proportionality is one of the controversial buzzwords associated with the 2015 Amendments, new Rule 26(b)(1) is perhaps more notable for the language that was removed than for the language put back in.[43] Most notably, any reference to subject matter discovery is gone.[44] From 1946 until 1993, Rule 26(b)(1) defined the scope of discovery to include "any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party."[45] In 2000, the Committee separated the concepts of information relevant to the subject matter of the action and information relevant to the parties' claims and defenses.[46] The Committee changed the scope of discovery language to include "any matter, not privileged, that is relevant to the claim or defense of any party"[47] and reworded and relocated the reference to subject matter discovery by inserting "[f]or good cause, the court may order discovery of any matter relevant to the subject matter involved in the action" later in the

38. FED. R. CIV. P. 26(b) Advisory Committee's note to 1993 amendment.

39. FED. R. CIV. P. 26(b)(1) (2000).

40. FED. R. CIV. P. 26(b)(2)(C) (2006).

41. *See* FED. R. CIV. P. 26(b) Advisory Committee's note to 2015 amendment (noting that the 1993 relegation to subpart (b) may have "softened" the focus on the proportionality factors).

42. FED. R. CIV. P. 26(b)(1) Advisory Committee's note to 2015 amendment.

43. *See* FED. R. CIV. P. 26(b)(1).

44. *Id.*

45. *Compare* FED. R. CIV. P. 26(b) (1946 Amendment), *with* FED. R. CIV. P. 26(b)(1) (1993 Amendment).

46. FED. R. CIV. P. 26(b)(1) (2000 Amendment).

47. *Id.*

subsection.[48] By requiring a showing of good cause to authorize discovery beyond what is relevant to the parties' claims or defenses, namely subject matter discovery, the Committee hoped to "involve the court more actively in regulating the breadth of sweeping or contentious discovery."[49] In the 2015 Amendments, the Committee rejected the distinction between information relevant to the subject matter of the action and information relevant to the parties' claims and defenses.[50] The Committee stated, "Proportional discovery relevant to any party's claim or defense suffices, given a proper understanding of what is relevant to a claim or defense."[51] In the Committee's eyes, at least, relevant and proportional subject matter discovery is still available under the new Rule 26(b)(1), even though the "subject matter" language is gone.[52]

Also gone is the talismanic phrase "reasonably calculated to lead to the discovery of admissible evidence."[53] The phrase was introduced into the Federal Rules by the 1946 amendments to make clear that discovery was not limited by the admissibility of the evidence sought.[54] Since then, the phrase has been used incorrectly by some to define the scope of discovery.[55] Attempting to eliminate the misuse of the phrase to expand the scope of discovery, the Committee replaced it with a more concise statement of the original intent: "Information within this scope of discovery need not be admissible in evidence to be discoverable."[56]

Less controversial than the overhaul of Rule 26(b)(1) is the authorization under Rule 26(c)(1)(B) for the courts to allocate the expenses of discovery when issuing protective orders.[57] Courts have long had the authority to shift costs in discovery.[58] The Committee elected to make that authority explicit in the Rules to "forestall the temptation some parties may feel to contest this authority."[59]

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48. *Id.*
49. FED. R. CIV. P. 26(b)(1) Advisory Committee's note to 2000 amendment.
50. FED. R. CIV. P. 26(b)(1) Advisory Committee's note to 2015 amendment.
51. *Id.*
52. *Id.*
53. FED. R. CIV. P. 26 Advisory Committee's note to 2015 amendment.
54. Report of Advisory Committee on Rules for Civil Procedure, Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States 32-33 (June 1946). The phrase appeared in the 1946 amendment to Rule 26(b), which at the time governed depositions only, but was incorporated by reference into Rules 33 and 34. *Id.* at 47-53.
55. FED. R. CIV. P. 26(b)(1) Advisory Committee's note to 2015 amendment.
56. FED. R. CIV. P. 26(b)(1).
57. FED. R. CIV. P. 26(c)(1)(B).
58. *See* Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 358 (1978).
59. FED. R. CIV. P. 26(c)(1)(B) Advisory Committee's note to 2015 amendment.

Another significant change to Rule 26 is the creation of Rule 26(d)(2), which allows parties to deliver Rule 34[60] document requests earlier.[61] Under this new Rule, a party may deliver document requests to another party more than twenty-one days after that party has been served with a summons and complaint, but prior to the Rule 26(f) meet and confer.[62] Requests delivered early under this Rule are not considered served, however, until the first Rule 26(f) conference.[63] The goal of this amendment is to allow the parties to engage in informed and, therefore, more meaningful exchanges about discovery at the Rule 26(f) conference.[64] This amendment is another example of the Committee encouraging earlier dialogue about discovery in the hope of avoiding unnecessary discovery disputes.

D. Rule 34—Improving Responses to Document Requests

The 2015 Amendments to Rule 34 target three common practices that routinely result in unnecessary discovery disputes: (1) boilerplate objections; (2) failure to produce documents when they are due; and (3) failure to indicate whether documents are being withheld due to an objection.[65] As amended, Rule 34(b)(2)(B) requires parties to either allow the inspection of the evidence as requested or "state with specificity the grounds for objecting to the request, including the reasons."[66] The amendment outlaws boilerplate discovery objections by requiring objecting parties to state the factual basis for all objections.[67] This change addresses one of the primary complaints of the opponents to the amendments to Rule 26(b)(1), who argued that including the proportionality factors within the scope of discovery would result in a new boilerplate objection for proportionality.[68] It also has the effect of

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60. FED. R. CIV. P. 34.
61. FED. R. CIV. P. 26(d)(2).
62. *Id.*
63. *Id.*
64. *See* FED. R. CIV. P. 26(d)(2) Advisory Committee's note to 2015 amendment.
65. FED. R. CIV. P. 34 Advisory Committee's note to 2015 amendment.
66. FED. R. CIV. P. 34(b)(2)(B).
67. *Id.* Many federal circuit courts, including the Eleventh Circuit, frowned upon boilerplate objections already. *See, e.g.*, Panola Land Buyers Ass'n v. Shuman, 762 F.2d 1550, 1559 (11th Cir. 1985) (holding "[t]o be adequate, objections which serve as the basis of a motion for protective order under Fed.R.Civ.P. 26 should be plain enough and specific enough so that the court can understand in what way the interrogatories are alleged to be objectionable.") (internal quotation marks omitted) (quoting Davis v. Fendler, 650 F.2d 1154, 1160 (9th Cir. 1981)).
68. FED. R. CIV. P. 26(b)(1) Advisory Committee's note to 2015 amendment. The Committee addressed this argument in its Notes for Rule 26(b)(1), stating: "Nor is the change intended to permit the opposing party to refuse discovery simply by making a

informing opposing counsel as to why the party deemed the request objectionable, which could allow for constructive discussion and compromise.[69]

The new Rule 34(b)(2)(B) also requires document production to be completed by the time specified in the request "or another reasonable time specified in the response."[70] This amendment prohibits the practice of providing a written response to a document request at the deadline for production stating documents *will* be produced at the dreaded "mutually convenient time."[71] A party needing more than thirty days to review and produce documents, which is not uncommon in cases with large volumes of ESI, can produce documents after the production period but must specify when production will occur in its written response.[72] This requirement is a well-conceived safety valve that recognizes the challenges of E-Discovery, but it anticipates producing parties being able to plan large document productions with some degree of specificity.[73] Parties well versed in E-Discovery project management will have no difficulty complying with the revised Rule, but for others, projecting production dates will be an inexact science that could frustrate the Rule's intent.[74]

The Committee also revised Rule 34(b)(2)(C) to require parties asserting objections to "state whether any responsive materials are being withheld on the basis of that objection."[75] This amendment targets the practice of "belt and suspenders" objection tactics whereby a party raises every conceivable objection, usually without much knowledge of the documents being sought, just in case there is a document in the collection to which one of the objections might apply.[76] As the Committee notes, confusion "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

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boilerplate objection that it is not proportional." *Id.*

69. *See id.*

70. FED. R. CIV. P. 34(b)(2)(B).

71. Robert K. Wise, *Ending Evasive Responsiveness to Written Discovery: A Guide for Properly Responding (and Objecting) to Interrogatories and Document Requests Under the Texas Discovery Rules*, 65 BAYLOR L. REV. 510, 568 (2013).

72. FED. R. CIV. P. 34(b)(2)(B).

73. *See* FED. R. CIV. P. 34(b)(2)(B) Advisory Committee's note to 2015 amendment (discussing staged document productions and suggesting parties should "specify the beginning and end dates of the production").

74. *See id.*

75. FED. R. CIV. P. 34(b)(2)(C).

76. FED. R. CIV. P. 34(b)(2)(C) Advisory Committee's note to 2015 amendment.

withheld on the basis of the objections."[77] It is not unheard of to file motions to compel over objections for which no documents have actually been withheld.[78] By requiring a party to state whether it is withholding documents on the basis of an objection, this Rule should eliminate such an unnecessary waste of time and resources.[79] Like the previous change to Rule 34(b)(2)(B), this rule requires the producing party to learn more information about its documents within the thirty-day response period than may have been their custom.[80] Conforming practices to these new rules will not be without challenges, and knowledge of E-Discovery work flows will be at a premium.

E. Rule 37—Spoliation Revisited

The 2015 Amendments to Rule 37(f)[81] regarding the failure to preserve ESI are another set of hot-button changes to the Rules that faced determined opposition.[82] The previous version of the rule, adopted in 2006, provided that "[a]bsent 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."[83] The 2006 rule recognized the traditional spoliation analysis used for hard copy documents was not appropriate for E-Discovery because of the unique nature of ESI, which is routinely altered or deleted through ordinary computer usage, absent any culpable conduct.[84]

The Committee believed the the 2006 version of Rule 37(f) was unsuccessful at reducing the related problems of excessive spoliation litigation and over—preservation of data to avoid spoliation litigation because of a circuit split over the level of culpability required to trigger the most severe sanctions.[85] As a result, the Committee scrapped the

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77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. FED. R. CIV. P. 37(f).
82. *See, e.g.*, Beisner, *supra* note 1, at 590-91.
83. FED. R. CIV. P. 37(f) (2006).
84. FED. R. CIV. P. 37(f) Advisory Committee's note to 2006 amendment.
85. FED. R. CIV. P. 37(e) Advisory Committee's note to 2015 amendment. Some circuits have held negligence is sufficient to trigger adverse inference instructions. *See* Talavera v. Shah, 638 F.3d 303, 312 (D.C. Cir. 2011); United States v. Laurent, 607 F.3d 895, 902-03 (1st Cir. 2010); Beaven v. U.S. Dep't of Just., 622 F.3d 540, 554 (6th Cir. 2010); Residential Funding v. DeGeorge Fin. Corp., 306 F.3d 99, 113 (2d Cir. 2002); Glover v. BIC Corp., 6 F.3d 1318, 1327 (9th Cir. 1993). Other circuits have required a finding of bad faith or intent-to-deprive to trigger severe sanctions. *See* Dalcour v. City of Lakewood, 429 F. App'x 924, 937 (10th Cir. 2012); Sherman v. Rinchem Co., 687 F.3d 996, 1006 (8th Cir. 2012);

2006 version of Rule 37(f) and created the new Rule 37(e),[86] which provides:

> 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.[87]

Under the new Rule, spoliation sanctions are only available if (1) relevant ESI that should have been preserved in anticipation of litigation, (2) is lost, (3) by a party who failed to take reasonable steps to preserve it, and (4) the lost ESI cannot be replaced through additional discovery.[88] This safe harbor from spoliation sanctions is significant because it signals that the rule does not impose strict liability for lost ESI. It also incentivizes parties to take reasonable steps to preserve data.[89] The Committee made clear in its notes that "'reasonable steps' to preserve suffice; [Rule 37(e)'s safe harbor] does not call for perfection."[90] In evaluating reasonableness of preservation efforts, the Committee advises courts to consider the party's resources, proportionality, and whether the loss of ESI was beyond the party's control.[91]

If a party fails to take reasonable steps to preserve ESI that should have been preserved and the ESI is lost, the court must determine if additional discovery can restore or replace the lost ESI.[92] If the lost

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Rutledge v. NCL (Bahamas), Ltd., 464 F. App'x 825, 829 (11th Cir. 2012); Faas v. Sears, Roebuck & Co., 532 F.3d 633, 644 (7th Cir. 2008); Russell v. Univ. of Tex., 234 F. App'x 195, 207-08 (5th Cir. 2007); Hodge v. Wal-Mart Stores, Inc., 360 F.3d 446, 450-51 (4th Cir. 2004).

86. FED. R. CIV. P. 37(e).

87. *Id.*

88. *Id.*

89. *Id.*

90. FED. R. CIV. P. 37(e) Advisory Committee's note to 2015 amendment.

91. *Id.*

92. ESI can often be recovered from alternative sources. For example, a lost email can sometimes be recovered by a subpoena to a non-party recipient, deleted files may exist on backup media or in unallocated sections (a/k/a "Slack Space") on a hard drive, and in some

ESI can be replaced, no sanctions are permitted under Rule 37(e), even if the party that lost the ESI destroyed it intentionally.[93] However, if the lost ESI cannot be replaced, and a party has been prejudiced by the loss, the court is authorized to order curative measures no greater than necessary to cure the prejudice.[94] The Rule does not otherwise limit the courts' ability to fashion remedial measures, leaving the court with discretion to craft creative curative measures appropriate to the facts and circumstances of the case.[95]

So-called "case killer" sanctions—adverse inference instructions, dismissal of claims, and default judgment—are available only in cases in which ESI that should have been preserved was lost by a party with the specific intent to deprive another party of the use of the information in the litigation.[96] Notably, the imposition of case-killing sanctions does not require a finding of prejudice.[97] The Committee explained that a finding of prejudice is unnecessary under Rule 37(e)(2) because a "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."[98] The Committee urged the courts to administer the sanctions in Rule 37(e)(2) with caution, noting a finding of intent to deprive does not always require the imposition of the most severe sanctions.[99]

II. CASE LAW DEVELOPMENTS

The 2015 Amendments are game changers for many of the most litigated aspects of E-Discovery, most notably, spoliation.[100] Thus, the precedential value of many of the E-Discovery opinions issued in 2015 is somewhat diminished. Nevertheless, a few E-Discovery cases in the Eleventh Circuit in 2015 merit consideration, even as cases employing the newly-amended Rules start to come down from the courts.

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instances, testimony may suffice to replace the missing ESI.

93. FED. R. CIV. P. 37 Advisory Committee's note to 2015 amendment.
94. *Id.*
95. *Id.*
96. FED. R. CIV. P. 37(e)(2).
97. FED. R. CIV. P. 37(e)(2) Advisory Committee's note to 2015 amendment.
98. *Id.*
99. *Id.*
100. *Id.*

A. *Proportionality*

One case within the Eleventh Circuit this survey period—*In re: Blue Cross Blue Shield Antitrust Litigation*[101]—applied the proportionality factors set forth in the amended Rule 26(b)(1).[102] The plaintiffs in this case sought to discover expert reports and deposition transcripts from other, unrelated lawsuits filed against defendant Blue Cross Blue Shield of Michigan (BCBS). BCBS argued the reports and transcripts were beyond the revised scope of discovery because they did not involve the facts of the instant litigation.[103] The court rejected BCBS's argument as too narrow an interpretation of Rule 26(b)(1), finding that the revised scope of discovery was not limited to the facts of the case but included "other 'matters' that remain relevant to a party's claims or defenses, even if not strictly fact-based."[104] The court found the reports and transcripts related to "other incidents of the same type" and thus satisfied the relevance portion of the discoverability test, despite the deletion of the reference to "subject matter" discovery.[105]

Next, the court applied the proportionality factors.[106] Considering the sought–after evidence's importance on the issues at stake in the action, the court concluded that the reports and transcripts from unrelated litigation were only "tangentially" important as they addressed "only a small, secondary issue in this case."[107] Next, the court considered the amount at stake in the litigation and found that the case involved "perhaps billions of dollars, as well as the continued viability of the Blue Cross-Blue Shield business model."[108] Considering the parties' relative access to the information, the court concluded the plaintiffs had no access to the information apart from discovery in this action.[109] The court considered the parties' resources but declined to weigh that factor in either party's favor because the plaintiffs "seem to be able to meet the manpower and financial demands of such high-stake litigation."[110] The court also could not determine whether the sought-

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101. No. 2:13-CV-20000-RDP, 2015 U.S. Dist. LEXIS 174768 (N.D. Ala. Dec. 9, 2015).
102. *Id.* at *1.
103. *Id.* at *17-18.
104. *Id.* at *20.
105. *Id.* at *19-20 (quoting FED. R. CIV. P. 26(b)(1) Advisory Committee's note to 2015 amendment).
106. *Id.* at *20-21.
107. *Id.* at *21.
108. *Id.*
109. *Id.* at *21-22.
110. *Id.* at *22.

after discovery was important in resolving issues in the case.[111] Finally, the court considered "whether the burden or expense of the proposed discovery outweigh[ed] its likely benefit."[112] The court found the burden of producing eleven expert reports and eight expert deposition transcripts was so small that it could not say the burden outweighed the benefits.[113] Finding this last element the most persuasive, the court concluded the reports and transcripts were discoverable.[114]

Given the type of information at issue in *In re Blue Cross Blue Shield*, the opinion does not give much useful guidance on interpreting the proportionality factors, but it is illustrative of the process for determining discoverability under the new Rule 26(b)(1).[115]

B. Sanctions

The biggest E-Discovery opinion to come out of the Eleventh Circuit in this survey period was *In re Delta/Airtran Baggage Fee Antitrust Litigation*,[116] in which the court ordered Delta to pay $2,718,795.05 in sanctions for "discovery misconduct."[117] This opinion is notable because, despite the large monetary sanction, Delta was not found to have spoliated evidence.[118] The court agreed with the special master's report and recommendation that there was insufficient evidence to conclude Delta acted in bad faith or lost relevant information.[119]

Instead, the court sanctioned Delta for a pattern of E-Discovery incompetence throughout the case.[120] The motion for sanctions decided in the 2015 opinion was the fourth such motion against Delta in the four years of discovery in the case.[121] In each instance, Delta avoided a finding of intentional misconduct, but the mistakes continued to pile up. At issue in the first motion for sanctions was Delta's delay in preserving emails from certain custodians and turning off its backup tape recycling program. The second motion for sanctions focused on Delta's collection

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111. *Id.*
112. *Id.* at *24.
113. *Id.*
114. *Id.*
115. *Id.*
116. No. 1:09-md-2089-TCB, 2015 U.S. App. LEXIS 101474 (11th Cir. Aug. 3, 2015).
117. *Id.* at *63-64, *79.
118. *Id.* at *29 (noting that Delta had "dodged the bullet" by getting away with monetary sanctions because it had narrowly avoided spoliation sanctions for the fourth time in the litigation).
119. *Id.* at *26-27.
120. *Id.* at *28.
121. *Id.* at *11.

of ESI from its active email servers and shared network servers only, overlooking potentially relevant ESI stored on custodians' hard drives, including archived emails. Delta was sanctioned $1,285,144.13 for these oversights. The third motion for sanctions targeted Delta for initially failing to review twenty-nine backup tapes for relevant ESI. Delta was sanctioned $3,490,520.72 for the mistakes giving rise to the third motion. The fourth motion for sanctions asserted a number of violations against Delta, including claims Delta destroyed evidence, concealed or belatedly produced evidence, made false statements, and continued to withhold relevant documents.[122]

Although the court failed to find bad faith or intentional misconduct, it stated: "'[Delta]'s discovery violations have been taxing to plaintiff[s] and the Court, and have expanded this litigation in ways [Delta] still does not seem to grasp.'"[123] The court continued, "Delta's discovery misconduct has rendered the Court's attempts to manage this litigation and move it toward a resolution on the merits as futile and maddening as Sisyphus's efforts to roll his boulder to the top of the hill."[124] Although the violations giving rise to the sanctions included violations of Rules 16, 26, and 37, the opinion is really about Delta's frustration of the directive of Rule 1's directive for the just, speedy, and inexpensive determination of all claims.[125]

III. CONCLUSION

This survey period will be remembered as the year of the Amendments to the Federal Rules. With new tools for managing E-Discovery and clear guidance on sanctions, the courts in the Eleventh Circuit have a new mandate to rein in the escalating costs and delays caused by E-Discovery, whether caused intentionally or unintentionally by the parties. Next year's survey period will begin to reveal the true impact of the 2015 Amendments on E-Discovery practice in the Eleventh Circuit.

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122. *Id.* at *12-13, *16, *17, *18, *19.

123. *Id.* at *27 (alterations in original) (quoting SCQuARE Int'l, Ltd. v. BBDO Atlanta, Inc., No. 1:04-CV-641-JEC, 2008 U.S. Dist. LEXIS 5490, at *1, *8 (N.D. Ga. Jan. 25, 2008)).

124. *Id.*

125. *Id.* at *52; *see also* FED. R. CIV. P. 1.

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