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Discovery insights
5 questions about the proposed amendment to Federal Rule of Civil Procedure 37(e)

An interview with Robert B. "Barry" Wiggins, Director, Discovery, Deloitte Financial Advisory Services LLP.

In 2006, the Federal Rules committee added the so-called safe harbor provision to the Federal Rules of Civil Procedure to protect organizations from the loss of data that resulted from the "routine, good faith operation" of their computer systems. In the years since that amendment, attorneys, judges and thought leaders in the eDiscovery industry have been assessing whether the rule requires a revision. As a result, a new proposed rule 37(e) has been drafted.

Questions	Barry's take
What were the basic drivers behind the proposed amendments to FRCP 37(e)?	The Federal Rules of Civil Procedure underwent a major overhaul in 2006 with what were then referred to as the eDiscovery amendments. Through those amendments, the rules committee sought to address the rising number of issues associated with discovery of electronically stored information, or ESI. A key area of concern then — as it is now — was how to address the loss or significant alteration of discoverable ESI. Over the years since the adoption of Rule 37(e), courts have attempted to resolve questions concerning spoliation by employing various approaches. Some courts are adopting an almost tort-like approach to this issue, while others sought to resolve these issues by balancing the producing party's fault with the importance of the lost information to the party seeking discovery.
How do the proposed amendments seek to address these concerns?	The proposed revisions explain more clearly four basic propositions: First, curative measures should be available without any need to find fault in the failure to preserve. Second, "sanctions" should not be imposed on a party that acted reasonably even though information was nevertheless lost. Third, sanctions may be proper when loss of information imposes substantial prejudice on a party and resulted from willful or bad-faith failure to preserve. And fourth, sanctions may be imposed when the loss of information completely stymies a party's ability to litigate, but only when the failure to preserve resulted from some fault of the party on whom sanctions are imposed.
What are the major headlines associated with the proposed amendment?	There are several parts to the proposal that warrant special attention by the practitioner. First, the language in the old rule has been completely stricken, and a more detailed and expansive rule has been proposed. Second, the proposed rule is not limited to ESI, but by its terms, which could apply to any type of evidence, regardless of its form. Third, the new rule would draw a distinction between "curative" measures and sanctions, depending generally on the level of fault associated with the loss of discoverable information and the importance of that information to the requesting party in prosecuting/defending its case.

Questions	Barry's take
Under what circumstances does the proposed rule apply curative measures and sanctions?	Proposed Rule 37(e)(1)(A) provides that "[i]f a party failed to preserve discoverable information that should have been preserved in the anticipation or conduct of litigation, the court may (A) permit additional discovery, order curative measures, or order the party to pay reasonable expenses, including attorney's fees, caused by the failure…" The Advisory Committee notes explain that curative measures can include, but are not limited to, permitting additional discovery that might not have been otherwise available, requiring the party that lost the information to restore the information through other means, requiring the party that lost the information to develop substitute information to replace that which was lost, permitting introduction at trial of evidence about the lost information, or allowing argument to the jury about the possible significance of the lost information. The proposed rule authorizes the issuance of an adverse inference instruction or sanctions, as defined in FRCP 37(b)(2)(A),[1] under two scenarios. First, after a finding by the court that the failure to preserve "caused substantial prejudice in the litigation and was willful or in bad faith," and second, upon a finding that the failure to preserve information "irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the action and was negligent or grossly negligent." What I find really interesting in the tests laid out in Proposed Rule 37(e)(1)(B)(i) and 37(e)(1)(B)(ii) is that the Committee seems to be moving toward the implementation of a sliding scale that generally seeks to balance prejudice to the requesting party and fault on the part of the producing party when it comes to imposing sanctions, thus requiring a higher degree of fault — willful action or bad faith — where "only" substantial prejudice is demonstrated and a lower (or perhaps no) degree of fault where the loss of discoverable information that otherwise ought to have been preserved imperils a party's ability to litigate its case — not just a claim. To guide courts in determining whether a party failed to preserve discoverable information, or acted in bad faith, or was negligent or grossly negligent, Proposed Rule 37(e)(2) provides a non-exhaustive lists of factors that ought to be considered including: the extent to which the party was on notice[2] that litigation was likely and that the information would be discoverable; the reasonableness of the party's efforts to preserve the information; whether the party received a request to preserve information, whether the request was clear and reasonable, and whether the person who made it and the party engaged in good-faith consultation about the scope of preservation; the proportionality of the preservation efforts to any anticipated or ongoing litigation; and whether the party timely sought the court's guidance on any unresolved disputes about preserving discoverable information.

[1] Sanctions under Rule 37(b)(2)(A) may include: "(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims; (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence; (iii) striking pleadings in whole or in part; (iv) staying further proceedings until the order is obeyed; (v) dismissing the action or proceeding in whole or in part; [or] (vi) rendering a default judgment against the disobedient party.…."

[2] The Draft Committee note to this section observes that "no specific feature or the litigation hold — for example, a written rather than an oral hold notice — is dispositive.

Questions	Barry's take
What's next for these proposed amendments?	The package of amendments to the Federal Rules of Civil Procedure that include Proposed Ruled 37(e) are now open to public comment. To guide that commentary, the drafters of amended 37(e) have asked for particular guidance on the following topics: • Whether the rule ought to be limited to ESI, as it is currently, or apply more broadly to other forms of evidence; • Whether Proposed Rule 37(e)(1)(B)(ii) ought to be retained and if so, whether the reference to negligence or gross negligence ought to be retained; • Whether provisions of the existing rule ought to be kept if the amendment is adopted; • Whether the phrase "substantial prejudice" ought to be defined in the rules; and • Whether the rules ought to define further willfulness and bad faith. I think it is going to be very interesting to see how these questions shape commentary and debate on the proposed new rule. Similarly, it will be worth noting how case law influences or is influenced by the proposed rules. For example, Judge Scheindlin — the author of the well-know *Zubulake* series of cases as well as the *Pension Committee decision* — recently questioned the proposed rule's requirement that a party demonstrate substantial prejudice in some cases in order to invoke court-ordered sanctions. Moreover, in *Sekisui American Corp. v. Hart,* which was published on August 15 — the same day that the comment period opened on the proposed amendments — the judge, citing Second Circuit precedent around the issuance of an adverse inference instruction, took issue with the proposed requirement that the moving party must show substantial prejudice even where evidence has been lost due to willful action or in bad faith, disapproving of the placement of that burden on an "innocent party." See *Sekisui American Corp. v. Hart,* Case 1:12-cv-03479-SAS-FM, slip op. at 14 & n. 51 (S.D.N.Y. August 15, 2013).

My take: Given the rising costs and risks associated with discovery in general, and efforts around preservation in particular, the proposed changes to Rule 37(e) are likely to attract significant public commentary. Of particular interest will be whether the rule grows to include all forms of evidence and if it adopts an approach that weighs varying degrees of fault against the degree of prejudice suffered on account of the loss of discoverable information. The draft also reflects how issues around electronic discovery continue to command the attention of judges, practitioners, and service providers.

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