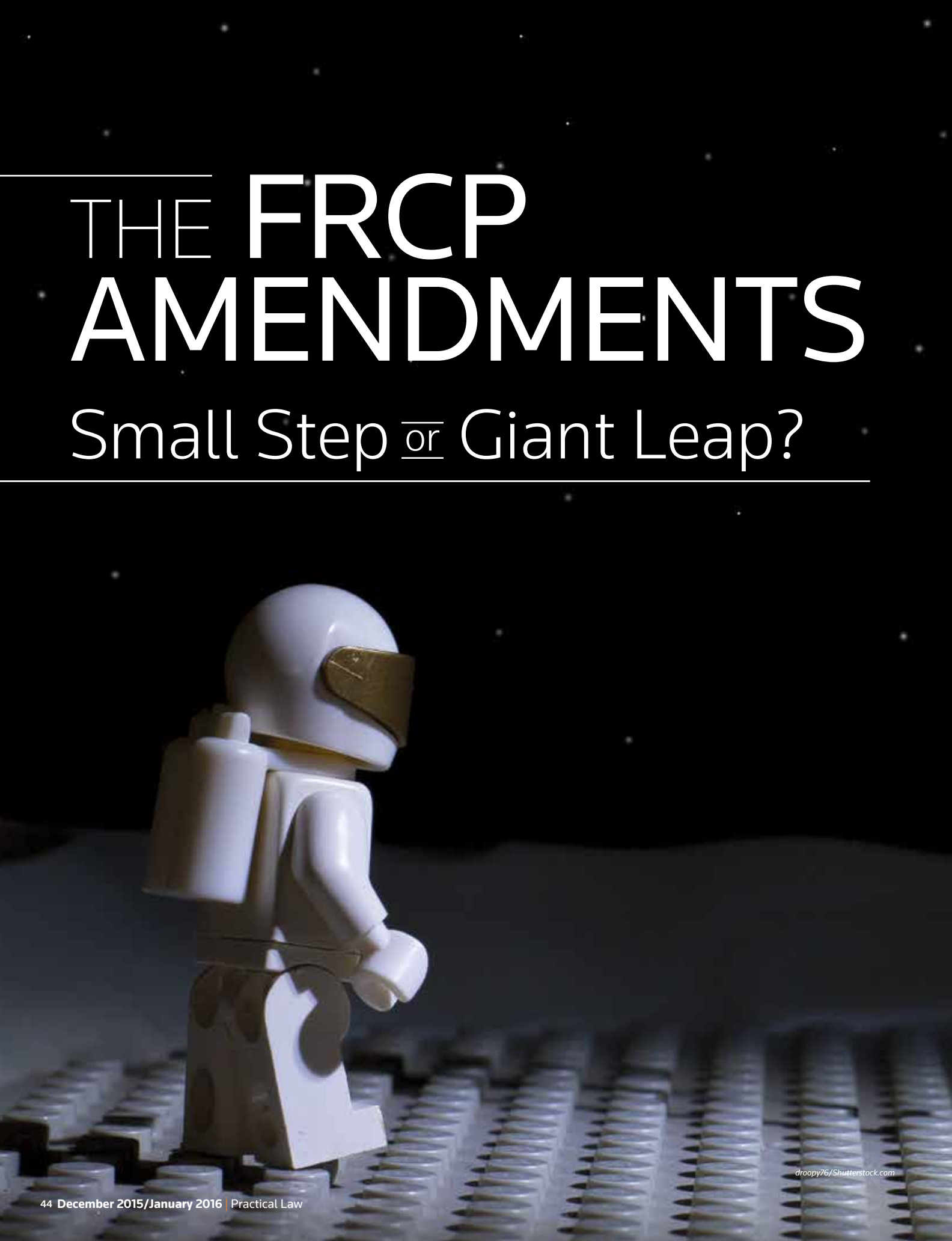
THE FRCP AMENDMENTS

Small Step or Giant Leap?



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The upcoming amendments to the Federal Rules of Civil Procedure (FRCP) emphasize familiar themes like cooperation and proportionality, and underscore a court's responsibility to manage cases efficiently and decisively. While many of the rule changes reflect existing best practices, the bar and judiciary must educate themselves on the intent behind the rules and work together to effect meaningful change in the litigation process. **Meagan Crowley-Hsu** of **Practical Law** reviews the key amendments and highlights the issues most likely to impact litigation practice.

In contrast to the relatively modest public debate on the 2006 amendments to the FRCP, the rulemaking process leading up to the most recent amendments ignited a firestorm of commentary. The proposed rule changes, which take effect on December 1, 2015, sparked over 2,000 public comments and testimony from more than 100 witnesses.

Despite the robust public engagement, however, the rules package might have a limited impact. Indeed, the changes to the FRCP reflect a renewed focus on evergreen topics like cooperation and proportionality, but do not require sweeping changes to existing practices by courts or litigants, according to Bradford Berenson, Vice President and Senior Counsel at General Electric Company. "The revised rules will not cause a radical shift," he says, "but they do move the needle a bit, and protect against gamesmanship and distortion in the litigation process."

Generally, the amendments are intended to improve case management and discovery in federal litigation in response to the increasing demands of electronically stored information (ESI). To achieve these goals, "it is important that counsel consider the rule amendments as an integrated whole," advises Judge Paul Grimm of the US District Court for the District of Maryland and a former member of the FRCP advisory committee. It is a mistake, he cautions, for counsel to focus on any one rule change without considering the broader context of the themes that animate the amendments, namely to:

- Promote early and active case management by increasing judicial engagement and charging the parties and their counsel with working cooperatively to achieve a just, speedy, and inexpensive resolution of every case (see *FRCP 1*, *4(m)*, *16(b)*, *26(d)*, *(f)*).
- Make discovery more proportional and effective by narrowing the scope of discoverable information and institutionalizing best practices for discovery requests and responses (see *FRCP 26(b)*, *34*).
- Limit costly over-preservation of ESI by establishing a uniform sanctions regime that includes a reasonableness standard and a level of defensibility for ESI loss (see *FRCP 37(e)*).

Search Overview of December 2015 Amendments to the Federal Rules of Civil Procedure for a chart summarizing the rule amendments.

EARLY AND ACTIVE CASE MANAGEMENT

"To keep federal courts open to parties of all economic classes and cases of all types, we have to make litigation more affordable and speedier without compromising justice," says John Barkett, a partner at Shook, Hardy & Bacon, L.L.P. and a member of the FRCP advisory committee. "We simply cannot price federal litigation out of the market."

To improve case management and, in turn, lower litigation costs, the rule amendments:

- Shorten the timeframes for service and Rule 16 scheduling conferences.
- Promote direct interactions between the court and parties.
- Emphasize the importance of cooperation between the parties.
- Facilitate more effective Rule 26(f) meet and confers.

SHORTENED TIMEFRAMES

According to Judge Grimm, a common complaint raised during the rulemaking process was that the 120 days permitted both for service of the summons and complaint under Rule 4(m), and between service and the Rule 16 scheduling conference, was unnecessarily long.

Under the revised rules, unless the parties show good cause to delay the deadlines:

- A plaintiff must serve the complaint within 90 days of filing (*FRCP 4(m)*). The new time limit does not apply, however, to service in a foreign country or in property condemnation proceedings under Rule 71.1(d)(3) (*2015 Advisory Committee Note to FRCP 4(m)*).
- The court must hold the scheduling conference by the earlier of:
  - 90 days after any defendant has been served; or
  - 60 days after any defendant has appeared.

  (*FRCP 16(b)(2)*.)

With these earlier triggers, Judge Grimm notes, the court and parties can set expectations sooner in the litigation process and start focusing their efforts on ways to achieve proportional and effective discovery.

DIRECT COMMUNICATIONS WITH THE COURT

To further reduce costs and delays in the early stages of litigation, amended Rule 16 highlights the importance of judicial involvement. "Too few judges have been educated on the benefits of active case management," Judge Grimm explains. He points to an informal survey he conducted showing that the overwhelming majority of district judges, and over half of magistrate judges, view themselves as dispute resolvers rather than case managers.

In addition to being contrary to the intent of the rules, that perception leads many judges to patiently tolerate discovery motion practice rather than heading off disputes in real-time. "I think the single most important factor to the success of the revised rules is broadening and promoting early judicial engagement," says Judge Grimm. "As a federal judge with a busy docket, would you rather get a three-page letter on a discovery dispute as it is brewing, or wait for a motion to compel with a 40-page brief supported by 100 exhibits? It's a no-brainer."

To foster active judicial case management, amended Rule 16 urges courts to:

- Hold initial scheduling conferences through any means of "direct simultaneous communication" (see *2015 Advisory Committee Note to FRCP 16(b)(1)* (removing language that permitted courts to hold a scheduling conference "by telephone, mail, or other means")).

- Use pre-motion conferences to address discovery disputes before engaging in motion practice (see *2015 Advisory Committee Note to FRCP 16(b)(3)(B)(v)* (adding pre-motion conferences to the list of topics courts should consider including in a case management and scheduling order)).
- Address in the scheduling order ESI preservation and the use of Federal Rule of Evidence (FRE) 502(d) orders to protect against waivers of the attorney-client privilege and work product protection (see *FRCP 16(b)(3)(B)(iii), (iv)*).

Aside from having to conduct Rule 16 conferences through a dialogue rather than simply on the papers, however, none of these changes requires a court to modify its approach to case management. "Most litigants hope that judges who were less inclined to police the boundaries of discovery will be somewhat more inclined to do so now," Berenson suggests. "But the rule changes do not compel that adjustment. They simply seem to encourage it."

Judge Grimm recommends that attorneys encourage judges to become more involved in case management by requesting in-person Rule 16 conferences and pre-motion conference calls, rather than expecting the court to do so without their input. He also advises counsel to consider requesting that judges designate a magistrate judge, special master, or mediator to help manage the discovery process if the judge is too busy.

Search US Magistrate Judges: Roles and Responsibilities and Improving E-Discovery Outcomes with ESI Special Masters for more on working with magistrate judges and special masters.

MORE COOPERATION

While the term "cooperation" had not been used previously in the FRCP or advisory committee notes, it has been a buzzword both in practice and case law in recent years. "Cooperation is now perceived positively by most clients, which is definitely a shift from several years ago," says Giyoung Song, Discovery Counsel at Skadden, Arps, Slate, Meagher & Flom LLP. "Serial litigants who are involved in cases with large volumes of ESI are generally receptive to the concept."

For these parties, the changes to Rule 1 are unlikely to have a significant impact on their litigation conduct. The revised rule does not reference cooperation directly, but instructs both the court and parties to use the FRCP "to secure the just, speedy, and inexpensive determination of every action and proceeding." The change emphasizes that attorneys and parties "share the responsibility" with the court to move cases forward in a cooperative and proportional manner. (*2015 Advisory Committee Note to FRCP 1.*)

Common Areas for Cooperation

There are many opportunities for cooperation in complex cases, Song notes. "For certain issues," she says, "adversaries are beginning to find that litigating might not be worthwhile." Song highlights several topics on which counsel can find common ground, such as:

- Search protocols and methodologies, including negotiated search terms (see *Box, Cooperation and TAR*).
- Limits on preservation or collection procedures, for example, excluding specified date ranges, custodians, or types of data sources, such as backup tapes.
- Sequencing or phasing of discovery to identify critical, outcome-determinative issues before seeking additional discovery.
- Forms of production, including disclosure of certain metadata.

To increase transparency and enhance cooperation, counsel must better understand data and systems at a technical level, adds Craig Ball, a certified computer forensic examiner, law professor, and electronic evidence expert. "Attorneys must be able to distinguish between benign information relating to integrity of process, such as search methodologies and capabilities, and sensitive client information relating to the

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merits of the case," he explains. "If counsel does not appreciate these differences, it is far more difficult to embrace cooperation."

Search Learning to Cooperate for more on the meaning of cooperation in discovery, what cooperation entails, and how to facilitate cooperation with opposing counsel.

Enforcement Mechanism

Notably, amended Rule 1 does not provide a new or an independent basis for sanctions, nor abridge any other rule (*2015 Advisory Committee Note to FRCP 1*). The lack of an enforcement mechanism has led many attorneys to deem the changes to Rule 1 "aspirational, in the nature of mood music," Berenson says. "Unfortunately, there are attorneys who have been trained in obstruction, obfuscation, and borderline irresponsible behavior when it comes to discovery. A few references salted in the advisory committee notes have a limited ability to alter that kind of conduct."

However, Barkett sees Rule 26(g) emerging as a powerful tool to enforce the cooperation mandate. Under this rule, an attorney signing a discovery request or response must certify that the attorney has complied with the discovery rules and that the attorney's request, response, or objection is not being served for an improper purpose and is not unduly burdensome (*FRCP 26(g)(1)*).

"By juxtaposing amended Rule 1 with Rule 26(g)(3), judges might consider a heightened standard for interpreting 'substantial justification,'" Barkett suggests. "And there is nothing like the risk of a personal sanction to modify an attorney's behavior."

If a court determines that a discovery request, response, or objection violates the discovery rules without "substantial justification," it must impose sanctions on the attorney, his client, or both (*FRCP 26(g)(3)*). The 1983 advisory committee determined that the mandatory nature of the provision was necessary because of judges' "asserted reluctance to impose sanctions on attorneys who abuse the discovery rules" (*1983 Advisory Committee Note to FRCP 26(g)*).

Although historically courts rarely relied on Rule 26(g) to impose sanctions, recent decisions show more frequent use of these sanctions where attorneys and their clients have failed to embrace transparency and cooperation in the discovery process (see, for example, *HM Elecs., Inc. v. R.F. Techs., Inc., 2015 WL 4714908, at *1, *12-14, *16, *18, *20 (S.D. Cal. Aug. 7, 2015)*; *Brown v. Tellermate Holdings Ltd., 2014 WL 2987051, at *17-23 (S.D. Ohio July 1, 2014)*; *Branhaven, LLC v. BeefTek, Inc., 288 F.R.D. 386, 391-92 (D. Md. 2013)*).

The revised rules help underscore the importance and availability of Rule 26(g) sanctions. "By juxtaposing amended Rule 1 with Rule 26(g)(3), judges might consider a heightened standard for interpreting 'substantial justification,'" Barkett suggests. "And there is nothing like the risk of a personal sanction to modify an attorney's behavior."

IMPROVED RULE 26(f) CONFERENCES

Several of the rule changes designed to improve Rule 26(f) conferences and discovery plans codify best practices that many attorneys already follow, according to Barkett. However, he expects more robust discussions at the meet and confers in light of the amendments. In particular, the revised rules:

- Encourage parties to exchange document requests under Rule 34 in advance of the Rule 26(f) conference, to facilitate a more productive and detailed dialogue about ESI discovery.
- Require parties to address both ESI preservation and potential privilege and work product waiver in their discovery plans.

Early Document Requests

In contrast with the former rule forbidding parties to serve document requests before the Rule 26(f) conference, amended Rule 26(d)(2) permits parties to make these requests before the conference, so long as they are delivered more than 21 days after the summons and complaint have been served. These early discovery requests are deemed to have been served as of the date of the Rule 26(f) conference. Following the conference, producing parties have 30 days to serve objections and responses. (*FRCP 26(d)(2), 34(b)(2)(A)*.) By exchanging the requests in advance, "parties can have a meaningful dialogue about potential scope problems without the time-to-respond clock ticking," Judge Grimm says.

Cooperation and TAR

The transparency that has become fairly common when parties use traditional search methods is more controversial when technology-assisted review (TAR) is involved. "The amendment to Rule 1 and the emphasis on cooperation should encourage parties to engage in good faith discussions about using TAR tools like predictive coding, de-duplication, near-duplication detection, email threading, and clustering," Song says.

Indeed, the advisory committee notes provide that courts and parties should consider whether TAR tools, if deemed reliable, are appropriate to minimize the burden or expense of discovery (see *2015 Advisory Committee Note to FRCP 26*). However, Song predicts that "requesting parties might use cooperation as a sword to obtain broader disclosure on an adversary's TAR process."

This is particularly likely in cases involving information asymmetry. "Producing parties should understand that a degree of transparency in any search methodology is necessary because they have exclusive access to the relevant ESI," Bays explains. "Requesting parties need some comfort that efforts to decrease the purported burdens of discovery for producing parties are not at the expense of a requesting party's right to obtain relevant information."

Search Predictive Coding: It's Here to Stay and Predictive Coding: A Primer for more on TAR tools.

"As the requesting party, we do not necessarily know exactly what evidence the other side has, so we cannot always narrowly tailor requests at the outset," notes Lea Bays, Of Counsel at Robbins Geller Rudman & Dowd LLP. By exchanging early document requests, producing parties can articulate specific burden arguments and requesting parties can narrow the scope of their requests accordingly. "Hopefully, this will move the ball forward so that time is not wasted during the meet and confer process," she adds.

To reach an agreement that reasonably narrows the scope of discovery requests, Song advises that counsel should be prepared to bring concrete and detailed information to the table. This might include, for example, information about the volume and responsiveness of ESI implicated by the requests, and the amount of time required to review it. According to Song, the information gathered during the initial ESI collection and analysis can facilitate negotiations by providing opposing counsel with some comfort that the requested ESI is duplicative or cumulative of other information the producing party has agreed to disclose. "This can help balance information asymmetry," she says. Moreover, if a producing party's proportionality arguments are not successful during the meet and confer discussions, Song reasons that "this early discovery analysis can bolster the concrete showing a party must make in motion practice."

Search Rule 26(f) Conference Checklist for more on the topics that counsel should be prepared to discuss at the Rule 26(f) meet and confer and steps to take after the conference.

For data-rich parties, the need to have concrete and detailed information on the scope of discovery in advance of the Rule 26(f) conference strengthens the argument for using early data assessment (EDA) tools, which requires significant upfront investment. Song cautions that justifying these costs can be difficult when discovery has not yet started. Exchanging early document requests may bring these issues to the forefront sooner in the litigation process and help rationalize the expense of EDA.

Search Case Assessment and Evaluation and The Advantages of Early Data Assessment for more on using EDA and early case assessment tools before discovery has commenced.

Better Discovery Plans

The amendments to Rule 26(f)(3), which add two topics to the required content of discovery plans, also are designed to encourage the early identification and resolution of potential disputes. Specifically, under the revised rule, discovery plans must state the parties' views and proposals on:

- **ESI preservation.** Parties must address preservation issues in the discovery plan itself, rather than just discussing them at the meet and confer (see *FRCP 26(f)(3)(C)*).
- **FRE 502(d) orders.** Parties must consider seeking a 502(d) order to protect against waiver of the attorney-client privilege or work product protection (see *FRCP 26(f)(3)(D)*).

Both plaintiffs' counsel and defense counsel have applauded these changes. "Adding preservation to the list of topics to

Allocating Discovery Costs: Looking Ahead

While courts have long ordered cost-shifting and cost-sharing of discovery expenses under certain circumstances, amended Rule 26(c) now expressly references a court's authority to do so (see *FRCP 26(c)(1)(B)* (permitting a court to include "the allocation of expenses" in a protective order)). However, the revised rules provide no specific or new guidance on the availability of cost-shifting.

Courts sometimes permit cost-shifting or cost-sharing to protect parties and non-parties from undue burden or expense, independent of costs awarded to prevailing parties under 28 U.S.C. § 1920(4). Courts typically base these decisions on the proportionality factors and others listed in the advisory committee notes, or on the added costs when a party must search for and produce information from inaccessible sources (see *2006 Advisory Committee Note to FRCP 26(b)(2)(B), (C)*; see also *Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 318-22 (S.D.N.Y. 2003)*; *Kleen Prods. LLC v. Packaging Corp. of Am., 2012 WL 4498465, at *18 (N.D. Ill. Sept. 28, 2012)*).

However, cost-shifting analyses are notoriously fact-specific and outcomes are unpredictable. Berenson notes that efforts to change and clarify the cost-shifting framework in discovery through a new set of amendments are likely on the horizon. "Cost-shifting is the next frontier to redress some of the imbalances caused by the asymmetrical burdens that discovery requests impose," he says. "We need to find a way to force the requesters of evidence to factor in the costs and burdens of finding and producing it more than they do now." Berenson suggests that this type of reform might involve shifting costs to sophisticated, corporate plaintiffs whose claims are dismissed at the pleading phase or on summary judgment.

Ball agrees that plans to change the approach to cost-shifting are forthcoming, but doubts that any proposals will be limited to well-resourced plaintiffs. "I think we will see more attempts to include additional components of e-discovery in the taxation of costs, or to permit requesting parties to have the discovery they want, but at their own expense," he says. These efforts, however, might promote a system where only the wealthy have access to the discovery they seek, chilling the ability of plaintiffs to bring and prove their cases. "That would be a mistake," Ball adds, "especially given that only about 1% of lawsuits actually go to trial today."

address early on when developing a discovery plan makes it less likely that ESI will be lost," Bays says. Even where a party failed to preserve relevant ESI, requiring opposing counsel to focus on these issues early encourages the parties to jointly develop potential solutions. "Sanctions do not help us obtain the information that we requested," Bays adds, "and the information is really what we are after."

Barkett agrees. "Now that preservation is on the list of items to discuss, it is important to avoid 'gotcha' situations later," he says. "You do not want to try a case hoping that someone falls into a sanctions trap. You want merits-based resolution of claims."

Search Rule 26(f) Report and Discovery Plan for a sample report and discovery plan that parties can use to memorialize the results of their meet and confer, with explanatory notes and drafting tips.

DISCOVERY BEST PRACTICES

The amendments to Rules 26 and 34 are expected to immediately impact counsel's approach to discovery by limiting the scope of documents and ESI that are discoverable. At a minimum, the amendments direct counsel to rethink how to draft objections and responses, and to discard boilerplate forms entirely.

NARROWED SCOPE OF DISCOVERABLE INFORMATION

Amended Rule 26(b)(1) redefines the scope of discovery. It permits only discovery that is both:

- Proportional to the needs of the case.
- Relevant to any party's claim or defense.

Proportionality Factors

In determining proportionality in discovery, parties and courts must consider the following factors:

- The importance of the issues at stake in the case.
- The amount in controversy.

- The parties' relative access to relevant information.
- The parties' resources.
- The importance of the discovery in resolving the case.
- Whether the burden or expense of the discovery outweighs its likely benefit.

(*FRCP 26(b)(1)*; see also *FRCP 30*, *31*, *33* (reflecting the proportionality factors in requests to expand discovery, for example, to increase the number or length of depositions, or to permit more than 25 interrogatories).)

All but one of these proportionality factors have been in the FRCP since 1983, most recently located in Rule 26(b)(2). The current rule changes restore the factors to their original, more prominent place in Rule 26(b)(1), as part of how the scope of discovery is defined. This stresses the parties' obligation to consider proportionality at the outset of litigation rather than after they have incurred significant collection, review, and production costs. The new factor, directing parties to consider their relative access to relevant information, reinforces the importance of proportionality considerations in cases involving information asymmetry.

Many attorneys have expressed concern that intensifying the focus on proportionality may have unintended consequences, including increasing discovery on discovery. For example, by objecting to a request based on proportionality, "a producing party opens up areas of inquiry that historically have been off-limits," Ball suggests. He explains that a party's financial resources typically are out-of-bounds, except where punitive damages are at issue. "By forcing a requesting party to justify its request and rebut a claim of undue burden," Ball says, "a party's wealth is one of the factors that must be weighed."

Search Discovery on Discovery for more on issues counsel should consider when seeking discovery about an adversary's efforts to preserve data and comply with document requests, and how to minimize discovery on discovery when faced with these requests.

Bays counters that the changes to Rule 26(b) are of limited significance in practice. "We already consider and engage in meaningful discussions about the proportionality factors," she says. "As a result, I do not see this amendment making a big change in the way we proceed with discovery."

Other attorneys agree that the elevation of proportionality, while beneficial, is likely to have a marginal impact. "Proportionality is not a magic elixir that can cure all the ills of discovery," Berenson comments. "It is a helpful tonic."

Search APB to Requesting Parties: Prepare for Proportionality or see page 28 in this issue for more on proportionality.

Relevant to a Claim or Defense

To further control excessive discovery, amended Rule 26(b)(1) eliminates a party's ability to discover information that only is:

- Relevant to the subject matter of the case (as compared to a party's claims or defenses).
- Reasonably calculated to lead to the discovery of admissible evidence.

Under former Rule 26(b)(1), discovery on the subject matter of a case beyond the pleaded claims and defenses was permitted "for good cause." During the rulemaking process, many attorneys argued that plaintiffs used that provision tactically to develop new claims or defenses and expand the scope of discovery.

Similarly, attorneys argued that the "reasonably calculated" language, which was added in 1946 to avoid hearsay objections during depositions, was consistently invoked to expand the scope of discovery and harass data-rich litigants. "We had a scope rule designed for depositions that was inadvertently expanded to the electronic world," Barkett remarks. "The language is far too broad when you are dealing with terabytes of information."

However, others have suggested that these excisions cure problems that do not exist. For example, the Federal Magistrate Judges Association noted that "very few" discovery disputes center on the distinction between what is relevant to the parties' claims or defenses and what is relevant to the case's subject matter (see *Comments of the Federal Magistrate Judges Ass'n on Proposed Amendments to FRCP (Feb. 7, 2014)*, available at *regulations.gov*).

Amended Rule 26(b)(1) also removes the express language permitting discovery of "the existence, description, nature, custody, condition, and location of any documents or other tangible things." In response to concerns that parties might use this change and the elimination of subject matter discovery to deny adversaries access to relevant metadata information, the advisory committee notes clarify that the rule does not limit a party's ability to discover information:

- On other incidents similar to those at issue in the litigation.
- On organizational or filing systems.
- To be used for impeachment purposes.

(*2015 Advisory Committee Note to FRCP 26(b)(1)* (stating that these three examples would qualify as relating to a claim or defense, and noting that information about data sources "is so deeply entrenched in practice that it is no longer necessary to clutter the long text of Rule 26 with these examples").)

Attorneys are hopeful that their adversaries will adhere to the guidelines in the advisory committee notes. "Information about ESI sources," Bays says, "is clearly necessary to negotiate an appropriate and proportional search methodology."

Ball also emphasizes the importance of metadata in discovery. "This ancillary information serves a critical purpose to effectively manage ESI, even if it has limited probative value regarding a party's claims or defenses," he says. "Metadata has a utility value for organization and authentication that cannot be overstated."

SPECIFIC DOCUMENT RESPONSES AND OBJECTIONS

The changes to Rule 34 aim to expedite the identification and production of relevant information. "The revised rule compels producing parties to have a grasp on the universe of documents and ESI subject to discovery earlier in the process, and will help them understand and explain any legitimate burden arguments," Bays notes.

Under amended Rule 34, a producing party's responses to requests for documents and ESI must:

- **Object with specificity.** Producing parties no longer may rely on broad, boilerplate objections that fail to notify the requesting party of the problems with its request. Without particular information about an objection, a requesting party and the court cannot fashion appropriate relief or narrow requests accordingly. The prohibition on boilerplate responses applies equally to objections based on the proportionality factors. (*FRCP 34(b)(2)(B)*; see *2015 Advisory Committee Note to FRCP 26(b)(1)*.)
- **State whether the party will produce copies or permit inspection, and specify a reasonable timeframe for production.** This provision requires parties to consider more carefully the best means of production, and is intended to cut down the long delays between productions that frequently occur if no deadlines are specified. A corresponding rule change authorizes a motion to compel production if a party fails to produce or permit inspection of the requested documents within the specified timeframe. (*FRCP 34(b)(2)(B)*, *37(a)(3)(B)(iv)*.)
- **State whether the party is withholding responsive materials.** This new requirement is intended to end the confusion that arises when parties state a litany of objections, while producing some information notwithstanding those objections. These seemingly contradictory actions make it impossible for a requesting party to determine whether any relevant and responsive information is being withheld on the basis of an objection. However, producing parties should take comfort that:
  - **Documents that are not identified through agreed search parameters do not have to be specified.** An objection that describes the limits of a search for responsive materials will qualify as a statement that materials not hitting on those terms are withheld.
  - **A "nonresponsive log" is not required.** The producing party does not have to provide a detailed inventory of withheld documents. Rather, an objection must provide sufficient notice to prompt a more detailed discussion with opposing counsel about the withheld materials. For example, counsel may describe categories of materials that have been withheld, such as specific date ranges or custodians that were not reviewed.

  (*2015 Advisory Committee Note to FRCP 34(b)(2)(C)*.)

Search Document Responses: RFP Response for a sample response to a request for the production of documents (RFP), including objections, that can be used in federal civil litigation, with explanatory notes and drafting tips.

MORE LIMITED PRESERVATION OF ESI

"Plaintiffs and defendants can agree that many organizations are over-preserving," Song says. "There is unquestionably a quantitative problem where, by some estimates, only .1% of the ESI produced is ultimately used as exhibits at trial or in summary judgment motions," she explains. "When you compare that against the amount of preserved ESI, the result is substantially less than .1%."

Over-preservation is caused in large part by differing standards and sanctions across jurisdictions. Large organizations looking to avoid sanctions in this patchwork system have enacted document retention policies that comply with the most rigid standards.

To help solve this problem, the revised rules create a uniform sanctions regime. A party seeking redress for its adversary's failure to preserve ESI now may obtain relief only if:

Attorneys must understand data streams for an increasing array of devices and applications. "Sequestering a laptop or hard drive obviously is no longer sufficient," Ball says. "Attorneys must know where the data is going to ensure that relevant and material information is being preserved."

- A common law duty to preserve the information existed because litigation was reasonably anticipated.
- The information subject to preservation is electronic, and was lost or destroyed.
- The producing party failed to use reasonable preservation efforts.
- The information cannot be restored or replaced through additional discovery.

(*FRCP 37(e)*.)

ESI LOSS

Amended Rule 37(e) applies only to ESI. Prior decisional authority on sanctions and spoliation, however inconsistent, remains intact for tangible items. Although the distinction between ESI and tangible items generally is clear, more ambiguity will emerge as technology advances.

"We need to consider the new reality of ESI," Ball explains, where information is stored, for example, on mobile devices, cloud servers, and social networking sites. Attorneys must understand data streams for an increasing array of devices and applications. "Sequestering a laptop or hard drive obviously is no longer sufficient," Ball says. "Attorneys must know where the data is going to ensure that relevant and material information is being preserved."

Case law will continue to be the primary source of guidance to identify ESI versus tangible materials. In addition to examining whether one party had exclusive access to the lost information, a court's inquiries likely will turn on practical distinctions, such as whether the data is:

- Duplicated in other locations.
- Deleted or modified on a regular basis, without conscious action by the person who created the data.

(See, for example, *Letter from Judge David G. Campbell, Chair, Advisory Committee on the FRCP to Judge Jeffrey Sutton, Chair, Standing Committee on Rules of Practice & Procedure, at 16 (June 14, 2014)*.)

To establish that ESI has been lost, a court will evaluate whether the information can be restored or obtained by other means, including through sources that otherwise would be considered inaccessible (*2015 Advisory Committee Note to FRCP 37(e)(1)*).

REASONABLE PRESERVATION EFFORTS

The revised rule does not create a duty to preserve apart from the common law duty, nor does it describe the circumstances constituting "anticipation of litigation" (attempts to specify the trigger, scope, and duration of a preservation obligation were abandoned as unfeasible). Instead, courts must focus on whether a party acted reasonably when it identified the existence of a preservation duty and developed the preservation parameters. The standard is reasonableness, not perfection, Judge Grimm notes. This inquiry requires a court to evaluate:

- The party's conduct at the time the preservation efforts were executed.
- The extent to which third parties had effective control of the lost ESI.
- Whether the preservation efforts were proportional.

(*2015 Advisory Committee Note to FRCP 37(e)*.)

"We wanted a rule that has both carrots and sticks," Judge Grimm says. Accordingly, under amended Rule 37(e), parties that acted reasonably cannot be sanctioned even if ESI is lost.

Search Practical Tips for Preserving ESI and First Steps for Identifying and Preserving Electronic Information Checklist for key issues companies should consider when preserving and producing ESI.

Reasonable in Hindsight

A court will examine the reasonableness of a party's efforts based on the circumstances that existed at the time the efforts were commenced, Judge Grimm explains. For example, a party may have acted reasonably by preserving only the information from its key custodians and repositories if the party considered its liability contained and forecasted only modest damages. "Hindsight analysis will not hold you to a greater standard if the dispute later ripens into an unforeseeably complex litigation," Judge Grimm adds.

Third-Party Control

The issue of who controls ESI for preservation purposes is increasingly important as more companies outsource certain

Proving a Failure to Preserve

Notably, amended Rule 37(e) does not allocate to either party the burden of establishing the elements of a failure to preserve, nor the prejudicial effect. Instead, the revised rule directs the court to request information and argument from the parties as needed.

This framework, Ball cautions, provides victims of spoliation "significant leverage to force extensive additional discovery to either replace the lost ESI or demonstrate the redundancy of the missing information." In that regard, he suggests, the revised rule might actually increase the costs and burdens associated with spoliation.

For example, to probe whether a party acted intentionally or merely negligently, a party may choose to pursue discovery regarding the producing party's state of mind at the time the ESI was lost. This opens up lines of inquiry that might include embarrassing or ill-tempered communications about a plaintiff or whistleblower that otherwise would be considered irrelevant.

This tactical use of discovery will impact the cost-benefit analysis of a case, even where the requested information ultimately has little bearing on the claims and defenses at issue. "There is a strong incentive to demonstrate that a party was acting maliciously," Ball says. By doing so, there is no need to prove prejudice, which depends on the specific content of the lost ESI. "The more I can prove intent, the less I have to prove content," he explains.

Therefore, parties should consider documenting their analyses on the extent and scope of the preservation measures they implement. This documentation can help a party defend its preservation decisions should an adversary allege that ESI was lost, particularly against claims that the party intentionally destroyed ESI. If disclosing its preservation analysis to an adversary raises privilege or work product concerns, the party should seek an order under FRE 502(d) to guard against potential waiver.

Search Fed. R. Evid. 502(d) Order for a sample order to protect against waiver of the attorney-client privilege or work product protection, with explanatory notes and drafting tips.

information technology functions. Berenson notes that service providers have their own rules and procedures. "Even if we have a contract that gives us certain rights over the data," he says, "we do not have practical control over how that data is stored or preserved."

Therefore, courts must assess "the extent to which a party knew of and protected against" risks posed by the third party's control (*2015 Advisory Committee Note to FRCP 37(e)*). Judge Grimm notes that a court may find that a party acted unreasonably, for example, if the party continued to store ESI subject to a preservation obligation on a cloud server whose provider had signaled:

- Imminent insolvency.
- Technological incompetence.
- Limits on the preservation abilities of its product.

Proportional Preservation

Although proportionality considerations will help limit the incidence of over-preservation, attorneys await more guidance on what proportionality looks like in this context. "Potential litigants will preserve less ESI," Song says, "but how much less is unclear."

Berenson notes that, in most situations, "companies easily can identify the custodians who played the most central role in a dispute, and whose storage media are almost certain to contain all or most of the potentially relevant evidence." Proportionality enables companies to focus on those custodians, he says, and "avoid imposing additional preservation obligations on tangential or marginal players whose knowledge or document universe is merely likely to be duplicative of the central players."

CURATIVE MEASURES AND SANCTIONS

Where a court determines that a party failed to properly preserve ESI, it may issue:

- Relief that is "no greater than necessary" to cure any prejudice suffered, where the party had no intent to deprive its adversary of using the ESI in the litigation (*FRCP 37(e)(1)*).
- Case-altering sanctions, only where the party destroyed ESI with the intent of depriving its adversary of the information (*FRCP 37(e)(2)*).

Negligent Failure to Preserve

Where a party negligently failed to preserve ESI, amended Rule 37(e)(1) precludes a court from relying on its inherent authority to impose case-altering sanctions. Instead, the court must

determine the prejudice suffered by the victim of the spoliation (see *Box, Proving a Failure to Preserve*) and consider different curative measures.

The court is afforded broad discretion in identifying and imposing appropriate curative measures, so long as the relief is no greater than necessary to cure the prejudice suffered and does not include the serious measures identified in Rule 37(e)(2). For example, the court may:

- Require discovery from sources that are not reasonably accessible and otherwise would be exempt from discovery under Rule 26(b)(1), such as backup tapes.
- Order a monetary award to offset financial prejudice.
- Permit the jury to draw inferences based on the party's failure to use reasonable efforts to preserve relevant ESI.
- Preclude a party from introducing specific evidence (though the court may not preclude evidence on a central claim or defense).

(*2015 Advisory Committee Note to FRCP 37(e)(1).*)

Intent to Deprive

A court may issue more serious sanctions only where it has established that there was an intent to deprive. In these cases, the moving party must demonstrate that the other party failed to preserve ESI with the specific intent of depriving its adversary of the data. Where the intent to deprive is established, prejudice to the other party is presumed (see *Box, Proving a Failure to Preserve*). This rule change provides a uniform standard in federal court for the imposition of severe sanctions, and expressly rejects a decision from the US Court of Appeals for the Second Circuit that was read by lower courts to permit an adverse inference instruction where a party negligently spoliated ESI (see *Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 108-110 (2d Cir. 2002)*; *Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 431 (S.D.N.Y. 2004)*).

Judge Grimm notes that courts are authorized, but not required, to impose case-altering sanctions in these cases, and should consider appropriate sanctions to address and deter failures to preserve. He stresses that "the remedy should fit the wrong." For example, these sanctions may include:

- An adverse inference instruction to the jury that it may or must presume the information was unfavorable.
- Dismissal of the action.
- An entry of default judgment.
- Striking pleadings or defenses.
- Precluding a party from offering evidence in support of a central claim or defense.

(*2015 Advisory Committee Note to FRCP 37(e)(2).*)

Meagan Crowley-Hsu joined Practical Law from Reed Smith LLP, where she was a senior associate focusing on complex commercial litigation. Previously, she was an associate at Debevoise & Plimpton LLP and a law clerk for the Honorable Joel A. Pisano of the District of New Jersey.

Interviewees

CRAIG D. BALL
PRESIDENT
CRAIG D. BALL, P.C.

Craig is a trial attorney, certified computer forensic examiner, and e-discovery consultant who frequently serves as a court-appointed ESI special master. He also teaches an e-discovery and digital evidence course at The University of Texas at Austin School of Law.

JOHN M. BARKETT
PARTNER
SHOOK, HARDY & BACON L.L.P.

John is an experienced commercial and environmental litigator and arbitrator, and is a Fellow of the American College of Civil Trial Mediators. He has served as a member of the FRCP advisory committee since 2012.

LEA MALANI BAYS
OF COUNSEL
ROBBINS GELLER RUDMAN & DOWD LLP

Lea focuses her practice on a range of e-discovery issues, from preservation through production. She is a member of The Sedona Conference Working Group on Electronic Document Retention and Production, and testified before the FRCP advisory committee.

BRADFORD A. BERENSON
VICE PRESIDENT & SENIOR COUNSEL, LITIGATION & LEGAL POLICY
GENERAL ELECTRIC COMPANY

Brad oversees the company's litigation and investigations worldwide. He previously was a litigation partner at Sidley Austin LLP and Associate White House Counsel under President George W. Bush.

HONORABLE PAUL W. GRIMM
US DISTRICT COURT JUDGE
DISTRICT OF MARYLAND

Judge Grimm was confirmed as a district judge in 2012 after 15 years as a federal magistrate judge. He served on the FRCP advisory committee for the past six years, including as chair of its discovery subcommittee.

GIYOUNG SONG
DISCOVERY COUNSEL
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Giyoung dedicates her practice primarily to discovery-focused litigation. She has extensive experience managing complex and sophisticated discovery issues, and regularly advises clients on discovery law, best practices, and practical solutions.