DATA AND DISCOVERY STRATEGIES CLIENT ALERT

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SHOOK HARDY & BACON

REVISED DISCOVERY RULES IN PRACTICE – SOME ANSWERS BUT QUESTIONS REMAIN

Since the amendments to the Federal Rules of Civil Procedure (Rules) took effect on December 1, 2015,[1] the revised Rules have been applied in hundreds of new and pending cases before federal courts. In that time, some early questions about the application and interpretation of the revised Rules have been answered, while other questions remain to be hashed out in further case law development. This analysis summarizes how courts have addressed some of the more significant of those questions in the revised Rules' first six months of use.

Questions Answered

Application

Under statutory authority and the order of the U.S. Supreme Court adopting the revised Rules, the Rules apply to all civil cases that arise after December 1, 2015, and all pending cases "insofar as just and practicable."[2] That, of course, begs the question of when application is considered "just and practicable."

Many courts in a position to address that question have either simply assumed application of the revised Rules (without analysis)[3] or made passing reference to the standard with no true analysis of if or why application was, in fact, just and practicable in the case.[4] Other courts have addressed the issue in more than a cursory fashion, however, and these cases suggest that it is "just and practicable" to apply the revised

Q: Do the revised Rules apply to my case?
A: Probably

Relevant cases:

- *McIntosh v. USA* (S.D.N.Y. March 31, 2016)
- *Accurso v. Infra-Red Services, Inc.* (E.D. Pa. Mar. 11, 2016)
- *Dao v. Liberty Life Assurance Co. of Boston* (N.D. Cal. Feb. 23, 2016)
- *Marten Transport, Ltd. v. Plattform Advert., Inc.*(D. Kan. Feb. 8, 2016)
- *Nuvasive, Inc. v. Madsen Med., Inc.* (S.D. Cal. Jan 26, 2016)
- *Kissing Camels Surgery Center, LLC v. Centura Health Corp.* (D. Colo. Jan. 22, 2016)
- *Cat3, LLC v. Black Lineage, Inc.* (S.D.N.Y. Jan. 12, 2016)
- *McKinney/Pearl Restaurant Partners, L.P. v. Metro. Life Ins. Co.* (N.D. Tex. Jan. 8, 2016)
- *Lightsquared Inc. v. Deere & Co.* (S.D.N.Y. Dec. 10, 2015)
- *Stinson v. City of NY* (S.D.N.Y. Jan. 2, 2016)

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Shook's Data and Discovery Strategies practice provides results that are creative, defensible and cost-effective. Discovery services include first-pass document review, privilege review, and production/logging, as well as preservation consultation, collections, and vendor selection and management. The group's focus also extends to records and information management – e.g., developing policies and procedures, and proposing strategies for defensible data disposition.

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Rules – at least – when (a) the relevant amendments result in no fundamental changes in the parties' obligations or in greater leniency toward the parties,[5] or (b) the parties cite the revised Rules in their briefs or have not argued against application of the Rules.[6]

In *Nuvasive, Inc. v. Madsen Med., Inc.* – the most substantive analysis of this issue to date – the Southern District of California applied revised Rule 37(e) – which establishes appropriate remedies and sanctions for loss of electronically stored information (ESI) – to reverse its earlier decision granting an adverse inference instruction.[7] Despite the defendants' opposition, the court found application of the revised Rule "just and practicable" because the adverse inference instruction had not yet been given and the revised Rule 37(e) provided adequate remedy for the plaintiff's destruction of evidence.[8]

As a general matter, it seems that most courts are amenable to applying the revised Rules,[9] but parties should take care to articulate their positions on the issue in their briefs.[10]

Judicial Management

Q: Have courts engaged in more active management of discovery?
A: Yes

Relevant cases:

- *Gibson v. SDCC* (D. Nev. Mar. 2, 2016)
- *O'Boyle v. Sweetapple* (S.D. Fla. Feb. 8, 2016)
- *Loop AI Labs Inc v. Gatti* (N.D. Cal. Feb. 5, 2016)
- *Morrison v. Quest Diagnostics Inc* (D. Nev. Jan. 27, 2016)
- *Roberts v. Clark County School Dist.* (D. Nev. Jan. 11, 2016)
- *Steuben Foods Inc. v. Oystar USA Inc.* (W.D.N.Y. Dec. 21, 2015)

Several opinions issued since December 1, 2015, indicate that the judiciary is acutely aware of the Rules Committee's goal of enhancing judicial management of discovery by means of the amendments.[11] This broad recognition is likely thanks, at least in part, to U.S. Supreme Court Chief Justice John Roberts' comments in his 2015 Year-End Report on the Federal Judiciary emphasizing "the crucial role of federal judges in engaging in early and effective case management."[12] Indeed, more than one court has quoted the chief justice and indicated its willingness to "step up to the challenge of making real change."[13]

But courts are looking to the parties to do the same, enforcing the obligation on parties to ensure the "just, speedy and inexpensive determination of every action" in accordance with revised Rule 1.[14] And courts are doing so at all stages of litigation, not just in the context of discovery.[15]

Burden of Proof Under Rule 26(b)(1)

One of the most frequently addressed issues in the several thousand comments offered during the public comment period before the revised Rules were adopted and implemented was the issue of who bears the burden of proof on proportionality under revised Rule 26(b)(1).[16] In response to such comments, the Committee Notes accompanying the Rule state:

> the change does not place on the party seeking discovery the burden of addressing all proportionality considerations. Nor is the change intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional. The parties and the court have a ***collective responsibility*** to consider the proportionality of all discovery and consider it in resolving discovery disputes.[17]

Despite the clear intent of the Rules Committee that the burden of establishing proportionality or its absence is shared by both parties, at least a few courts have suggested that one party or the other bears that burden in practice.[18] The majority of courts to have addressed this issue, however, have recognized that both parties bear some responsibility as to proportionality.[19] Some of these courts have indicated that the burden is a shifting one: once the requesting party makes a "threshold showing" of discoverability, the burden shifts to the responding party to show irrelevance and/or disproportionality.[20] Other courts have recognized that certain proportionality considerations are likely to be better known by one party than the other and look to the appropriate party to address such considerations.[21]

Although precise application has varied, the majority approach clearly imposes a burden to address proportionality on both parties to a discovery dispute. So, whether you are the requesting or the responding party, you should be prepared to address the relevant proportionality factors of revised Rule 26(b)(1) in any dispute in which proportionality of a discovery request is at issue.

Q: Who bears the burden of proving proportionality?
A: Generally, both parties

Relevant cases:

- *Wilmington Tr. Co. v. AEP Generating Co.* (S.D. Ohio Mar. 7, 2016)
- *Sprint Commc'n Co. L.P. v. Crow Creek Sioux Tribal Ct.* (D.S.D. Feb. 26, 2016)
- *Salazar v. McDonald's Corp.* (N.D. Cal. Feb 25, 2016)
- *Eramo v. Rolling Stone LLC* (W.D. Va. Jan. 25, 2016)
- *Henry v. Morgan's Hotel Grp.* (S.D.N.Y. Jan. 25, 2016)
- *Ark. River Power Auth. V. Babcock & Wilcox Co.* (D. Colo. Jan 15, 2016)
- *Gilead Sciences, Inc. v. Merck & Co., Inc.* (N.D. Cal. Jan. 13, 2016)
- *Bd. of Comm'rs of Shawnee Cty., Kan. v. Daimler Trucks N. Am., LLC* (D. Kan. Dec. 11, 2015)
- *Matthew Enter., Inc. v. Chrysler Grp.* (N.D. Cal. Dec. 10, 2015)
- *Carr v. State Farm Mut. Auto. Ins. Co.* (N.D. Tex. Dec. 7, 2015)

Monetary Sanctions for Lost ESI

Unlike some of its sister provisions in Rule 37, revised Rule 37(e) is silent as to whether monetary sanctions – including attorneys' fees – might be an appropriate sanction for lost ESI.[22] Under Rule 37(e)(1), a finding of prejudice resulting from the spoliated ESI warrants an order of undefined curative measures,[23] which presumably may include a monetary sanction that cures some or all of the prejudice to the requesting party.[24] But under Rule 37(e)(2), a finding of "intent to deprive another party of the information's use in the litigation" warrants one of three specifically identified types of sanctions, among which monetary sanctions are not included.[25] Thus, a court would not seem to have the power to issue monetary sanctions for spoliated ESI under Rule 37(e) absent a specific finding of prejudice – even with a finding of intent to deprive, the arguably more grievous grounds for sanction.

A ready resolution for this apparent incongruity is found in the Committee Notes to Rule 37(e), which state that "the finding of intent required by [Rule 37(e)(2)] 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 that favorable information."[26] So far, however, courts have justified monetary sanctions in loss-of-ESI situations on alternative grounds. In *Cat3, LLC v. Black Lineage, Inc.*, the court addressed a situation in which the plaintiffs intentionally manipulated emails to gain advantage in anticipated litigation.[27] Faced with what would appear to be a clear "intent to deprive" situation, the court took pains to find both "intent to deprive" and prejudice before awarding defendants, *inter alia*, "the costs, including reasonable attorneys' fees, incurred" to establish and secure relief from plaintiffs' discovery misconduct.[28] In *Best Payphones, Inc. v. City of New York*, after having determined that the defendant was not prejudiced by the plaintiff's failure to preserve tangible evidence and ESI, the court treated the plaintiff's motion for sanctions as a Rule 37(a) motion to compel because "in response to Defendants' motion Plaintiff turned over documents" that should have been previously produced.[29] And relying on Rule 37(a), the court awarded the defendants "reasonable attorneys' fees and costs incurred in connection with the motion."[30]

Q: Are monetary sanctions appropriate for spoliated ESI?
A: Yes

Relevant cases:

- *Best Payphones, Inc. v. City of NY* (E.D.N.Y. Feb. 26, 2016)
- *Cat3, LLC v. Black Lineage, Inc.* (S.D.N.Y. Jan. 12, 2016)

Thus, it appears that courts are willing and able to impose monetary sanctions when warranted in the face of lost ESI, with an express finding of prejudice under Rule 37(e)(1) or without a finding of prejudice under authority other than Rule 37(e).[31]

Questions Yet to Be Clearly Answered

Scope of Discovery Under Rule 26(b)(1)

Revised Rule 26(b)(1) provides that "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." But Rule 26's revisions include two significant omissions:

- The phrase "reasonably calculated to lead to the discovery of admissible evidence" was removed because it "has been used by some, incorrectly, to define the scope of discovery."[32]
- The provision that a court can order discovery "relevant to the subject matter involved in the action" for good cause has been removed because "[p]roportional discovery relevant to any party's claim or defense suffices."[33]

Q: Will Rule 26(b)(1) rein in the scope of discovery?
A: To be determined

Relevant cases:

- *Pertile v. Gen. Motors, LLC* (D. Colo. Mar. 17, 2016)
- *Haines v. Cherian* (M.D. Pa. Feb. 29, 2016)
- *Dao v. Liberty Life Assurance Co. of Boston* (N.D. Cal. Feb. 23, 2016)
- *ArcelorMiital Ind. Harbor LLC v. Amex Nooter* (N.D. Ind. Feb. 16, 2016)
- *O'Boyle v. Sweetapple* (S.D. Fla. Feb. 8, 2016)
- *Gilead Sciences, Inc. v. Merck & Co., Inc.* (N.D. Cal. Jan. 13, 2016)
- *United States ex rel. Shamesh v. CA, Inc.* (D.D.C. Jan. 6, 2016)
- *Zbylski v. Douglas Cty. School Dist.* (D. Colo. Dec. 31, 2015)
- *Polyone Corp. v. Lu* (N.D. Ill. Dec. 30, 2015)
- *Sibley v. Choice Hotels Int'l* (E.D.N.Y. Dec. 22, 2015)
- *Lightsquared Inc. v. Deere & Co.* (S.D.N.Y. Dec. 10, 2015)
- *La. Crawfish Producers Ass'n - West v. Mallard Basin, Inc.* (W.D. La. Dec. 4, 2015)

Despite these deliberate and reasoned omissions, a startling number of courts ostensibly applying revised Rule 26(b)(1) continue to invoke "subject matter" or "reasonably calculated" language in defining the scope of discovery, generally citing case law that pre-dates the revised Rule.[34]

But several courts have gotten it right,[35] and several respected members of the legal community have addressed the appropriate scope of discovery under revised Rule 26(b)(1) in recent presentations and publications.[36] Thus, there is hope that the full impact of the revised Rule 26(b)(1) will eventually take root and the Rules Committee's efforts to define "the proper focus of discovery"[37] will be universally recognized.

In the meantime, parties are advised to be cognizant of the revised scope of discovery under Rule 26(b)(1) and how the court in which they are proceeding has interpreted the Rule; to be prepared to brief their positions in accordance with

past and present versions of Rule 26; and, as appropriate, to use their briefs and arguments to the court as an opportunity to educate about Rule 26(b)(1)'s revisions and the rationale underlying those revisions.

Q: Has the court's inherent authority to sanction been limited by Rule 37(e)?
A: To be determined

Relevant cases:

- *FiTeq Inc. v. Venture Corp.* (N.D. Cal. Apr. 28, 2016)
- *Orchestratehr, Inc. v. Trombetta* (N.D. Tex. Apr. 18, 2016)
- *Friedman v. Phil. Parking Auth.* (E.D. Pa. Mar. 10, 2016)
- *InternMatch, Inc. v. Nxtbigthing, LLC* (N.D. Cal. Feb. 8, 2016)
- *DVComm, LLC v. Hotwire Commc'n.* (E.D. Pa. Feb. 3, 2016)
- *Cat3, LLC v. Black Lineage, Inc.* (S.D.N.Y. Jan. 12, 2016)

Inherent Authority to Sanction

Revised Rule 37(e) was drafted with "the goal of establishing greater uniformity in how federal courts respond to the loss of ESI."[38] With this in mind, the 2015 Committee Notes accompanying Rule 37 state that revised Rule 37(e) "forecloses reliance on inherent authority or state law to determine when certain measures should be used."[39]

Courts have bristled at this attempt to limit the judiciary's inherent authority to "remedy abuse of the judicial process."[40] Several spoliation decisions issued since December 1, 2015, have cited the court's inherent authority to sanction when addressing situations of lost ESI.[41] Nonetheless, in each instance, after asserting its authority, the court ultimately decided the issues in accordance with Rule 37.[42] As stated by the Northern District of California, "[w]hether a district court must now make the findings set forth in Rule 37 before exercising its inherent authority to impose sanctions for the spoliation of electronic evidence has not been decided."[43]

Unless and until the issue is definitively decided by relevant authority, parties would do well to address loss of ESI under the rubric set forth in Rule 37(e), while also heeding the guidance of case law governing application of the court's inherent authority to issue spoliation sanctions.

Effect on Preservation Practices

One of the important drivers for the changes to the Rules that became effective in December was the recognition that many companies err on the side of over-preserving ESI as a safeguard against the possibility of spoliation claims and/or sanctions down the road. It was the Rules Committee's hope that the Rules amendments would provide greater clarity and uniformity of standards relating to discovery generally and discovery of ESI specifically such that companies would feel comfortable making more reasoned and reasonable preservation decisions.[44]

Q: Will the revised Rules limit the practice of over-preservation?
A: To be determined

Relevant cases:

- *Marten Transport, Ltd. v. Plattform Advert., Inc.* (D. Kan. Feb. 8, 2016)
- *Zbylski v. Douglas Cty. School Dist.* (D. Colo. Dec. 31, 2015)

In one of the few cases to have substantively analyzed the reasonableness of a party's preservation efforts in the context of the revised Rules, the court in *Marten Transport, Ltd. v. Plattform Advertising, Inc.*, refused to "use a 'perfection' standard or hindsight in determining the scope of Plaintiff's duty to preserve ESI."[45] Instead, liberally quoting from the Rule 37(e) Committee Notes, the court found the plaintiff's efforts to preserve reasonable because the data at issue were destroyed pursuant to normal business practices before it was known to be relevant to the litigation.[46] If this decision serves as a guide, it suggests that courts will apply the concepts underlying the revised Rules in a manner consistent with the goal of limiting over-preservation practices. But recent comments from corporate in-house counsel and e-discovery practitioners indicate that it will take more than the Rules amendments or a single decision to effect such a change. Rather, companies and their legal advisors appear to be taking a conservative approach, waiting for a sufficient body of case law applying the Rules before forming any conclusions about the effect of those Rules vis-a-vis preservation and other discovery practices.[47] Considering the number of questions relating to application of the revised Rules that remain unanswered[48] roughly six months after their implementation, such caution may well be prudent.

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1 For an analysis of the revisions, *see* Shook, Hardy & Bacon Data and Discovery Strategies Client Alert, *Amendments to Discovery Rules – How Will You be Affected?* (Aug. 2015), available at http://www.shb.com/results/insights/attorney-articles/2015/q3/weisshaar-amendments-discovery-rules.

2 28 U.S.C. § 2074(a); Order of the Supreme Court dated April 29, 2015.

3 *See, e.g.*, *O'Berry v. Turner*, Nos. 7:15-CV-00064-HL, 7:15-CV-00075-HL, 2016 U.S. Dist. Lexis 55714, at *8 (M.D. Ga. Apr. 27, 2016); *Orchestratehr, Inc. v. Trombetta*, No. 3:13-cv-2110-P, 2016 WL 1555784, at *10 (N.D. Tex. Apr. 18, 2016); *Sibley v. Choice Hotels Int'l*, No. CV14-634, 2015 WL 9413101 at *2-3 (E.D.N.Y. Dec. 22, 2015); *Bry v. City of Frontenac*, No. 4:14-CV-1501, 2015 WL 9275661, at n.7 (E.D. Mo. Dec. 18, 2015).

4 *See, e.g.*, *Carr v. State Farm Mut. Auto. Ins. Co.*, 312 F.R.D. 459, 465 (N.D. Tex. 2015) ("The Court finds that applying the standards of Rule 26(b)(1), as amended, to State Farm's motion to compel is both just and practicable."); *Best Payphones, Inc. v. City of NY*, Nos. 1-CV-3924, 1-CV-8506, 3-CV-0192, 2016 U.S. Dist. LEXIS 25655, at n.1 (E.D.N.Y. Feb. 26, 2016) ("application of the new rule does not create issues of feasibility or injustice").

5 *Accurso v. Infra-Red Services, Inc.*, No. 13-7509, 2016 WL 930686, at n.6 (E.D. Pa. Mar. 11, 2016); *Dao v. Liberty Life Assurance Co.*, No. 14-cv-04749-SI, 2016 WL 796095, at *3 (N.D. Cal. Feb. 23, 2016); *Kissing Camels Surgery Center, LLC v. Centura Health Corp.*, No. 12-cv-03012, 2016 WL 277721, at n.3 (D. Colo. Jan. 22, 2016); *Cat3, LLC v. Black Lineage, Inc.*, No. 1:14-cv-05511, 2016 WL 154116, at *5 (S.D.N.Y. Jan. 12, 2016); *McKinney/Pearl Restaurant Partners, L.P. v. Metro. Life Ins. Co.*, No. 3:14-cv-02498, 2016 WL 98603, at *3 (N.D. Tex. Jan. 8, 2016).

6 *Marten Transp., Ltd. v. Plattform Advert., Inc.*, No. 14-cv-02464-JWL-TJJ, 2016 U.S. Dist. LEXIS 15098, at n.10 (D. Kan. Feb. 8, 2016); *McKinney*, 2016 WL 98603, at *3; *Lightsquared Inc. v. Deere & Co.*, 2015 U.S. Dist. LEXIS 166403, at *7 (S.D.N.Y. Dec. 10, 2015). *See also McIntosh v. USA*, No. 14-CV-7889, 2016 WL 1274585 (S.D.N.Y. March 31, 2016) (refusing to apply amended Rule 37(e) because "it

makes sense to apply the old rules to motions briefed before the new rules came into effect."); *Stinson v. City of NY*, No. 1:10-cv-04228-RWS, 2016 WL 54684, at n.5 (S.D.N.Y. Jan. 2, 2016) ("Since the motion was fully submitted prior to the effective date of the new Rule, and because the parties have not briefed these issues, it would not be 'just and practicable' to apply the new Rule here").

7 *NuVasive, Inc. v. Madsen Med., Inc.*, No. 3:13-cv-02077-BTM-RBB, 2016 WL 305096 (S.D. Cal. Jan 26, 2016).

8 *Id*. at *2-3.

9 *But see Stinson*, 2016 WL 54684, at n.5 (refusing to apply revised Rule 37(e)).

10 *McIntosh* and *Stinson* are examples of cases directly addressing the issue to find application of the revised Rules to "not be 'just and practicable,'" but several other discovery-related cases decided since Dec. 1, 2015, have simply applied the pre-Dec. 1, 2015, version of the Rules without analysis of or reference to the revised Rules. *See, e.g., McCabe v. Wal-Mart*, No. 2:14-cv-01987, 2016 WL 706191 (D. Nev. Feb. 22, 2016); *Benefield v. MStreet Entm't*, No. 3:13-cv-1000, 2016 WL 374568 (M.D. Tenn. Feb. 1, 2016).

11 *See, e.g., O'Boyle v. Sweetapple*, No. 14-81250-CIV, 2016 U.S. Dist. LEXIS 16642, at n.2 (S.D. Fla. Feb. 8, 2016); *Morrison v. Quest Diagnostics Inc.*, No. 2:14-cv-01207-RFB-PAL, 2016 U.S. Dist. LEXIS 10158, at *18-19 (D. Nev. Jan. 27, 2016); *Roberts v. Clark County School Dist.*, 312 F.R.D. 594, 603-604 (D. Nev. Jan. 11, 2016).

12 Chief Justice John Roberts, 2015 Year-End Report on the Federal Judiciary (Dec. 31, 2015), available at http://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf.

13 *O'Boyle*, 2016 U.S. Dist. LEXIS 16642, at n.2; *Morrison*, 2016 U.S. Dist. LEXIS 10158, at *19; *Roberts*, 312 F.R.D. at 604. *See also Gibson v. SDCC*, 2016 WL 845308, at *4 (D. Nev. Mar. 2, 2016) ("Chief Justice Roberts asked federal judges [in his Year-End report] 'to take on a stewardship role, managing their cases from the onset rather than allowing parties alone to dictate the scope of discovery' and to actively engage in case management to 'identify the critical issues, determine the appropriate breadth of discovery, and curtail dilatory tactics, gamesmanship, and procedural posturing'"). *But see Loop AI Labs Inc. v. Gatti*, No. 15-cv-00798-HSG, 2016 WL 1273914, at *1 (N.D. Cal. Feb. 5, 2016) ("The courts . . . simply do not have the resources to police closely the operation of the discovery process.").

14 *See, e.g., Wichansky v. Zowine*, No. CV-13-01208-PHX-DGC, 2016 U.S. Dist. LEXIS 37065, at *5 (D. Ariz. Mar. 22, 2016) ("Despite the ultra-litigious nature of this case, the Court is still striving to achieve Rule 1's goal of a 'just, speedy, and inexpensive determination' of this action. The Court reminds the parties and counsel that they too have a duty to achieve this goal."); *Webb v. Tabsin Indus. Corp.*, No. 4:14-cv-01499, 2016 U.S. Dist. LEXIS 14020, at *21 (M.D. Pa. Feb. 5, 2016) (pointing out that plaintiff's request "flatly contradicts" the party's obligation under Rule 1); *Steuben Foods Inc. v. Oystar USA Inc.*, No. 110-cv-00780-WMS, 2015 WL 9275748, at *1 (W.D.N.Y. Dec. 21, 2015) (lifting limits on number and duration of depositions but placing onus of compliance with proportionality provision of Rule 26(b)(1) and the mandate of Rule 1 on parties and their cooperative efforts).

15 *See Wichansky*, 2016 U.S. Dist. LEXIS 37065, at *5 (referencing Rule 1 in context of pretrial order setting time for trial); *Webb*, 2016 U.S. Dist. LEXIS 14020, at *21 (citing Rule 1 in context summary judgment determination).

16 The discovery-related Rules amendments "generated significant response," including more than 2,300 comments and testimony from more than 120 witnesses at three public hearings. Report of the Judicial Conference Committee on Rules of Practice and Procedure, Sep. 2014 ("Standing Committee Report"), at 14. All comments are available at http://www.regulations.gov/#!docketDetail;D=USC-RULES-CV-2013-0002. Hearing transcripts are available at http://www.uscourts.gov/file/9445/download?token=GRjY8M6s (Nov. 7, 2013); http://www.uscourts.gov/file/9446/download?token=MiUlresk (Jan. 9, 2014); and http://www.uscourts.gov/file/9447/download?token=y52aIMCA (Feb. 7, 2014).

17 Rule 26, 2015 Committee Notes (emphasis added).

18 *Gilead Sciences, Inc. v. Merck & Co., Inc.*, No. 5:13-cv-04057-BLF, 2016 WL 146574, at *1 (N.D. Cal. Jan. 13, 2016) ("***a party seeking discovery*** of relevant, non-privileged information must show, before anything else, that the discovery sought is proportional to the needs of the case.") (emphasis added); *Bd. of Comm'rs of Shawnee Cty., Kan. v. Daimler Trucks N. Am., LLC*, No. 15-4006-KHV, 2015 WL 8664202, at *2 (D. Kan. Dec. 11, 2015) (if relevance is apparent or has been established by the party seeking discovery, ***the objecting party*** bears the burden of establishing lack of relevance or disproportionality); *Ark. River Power Auth. v. Babcock & Wilcox Co.*, No. 14-cv-00638-CMA-NYW, 2016 WL 192269, *4 (D. Colo. Jan 15, 2016) (same).

19 *See, e.g.*, *Wilmington Tr. Co. v. AEP Generating Co.*, No. 2:13-cv-01213-EAS-TPK, 2016 U.S. Dist. LEXIS 28762, at *6 (S.D. Ohio Mar. 7, 2016) ("both parties have some stake in addressing the various [proportionality] factors"); *Salazar v. McDonald's Corp.*, No. 3:14-cv-02096-RS, 20160 WL 736213, at *2 (N.D. Cal. Feb 25, 2016) ("the revised rule places a shared responsibility on all the parties to consider the factors bearing on proportionality before propounding discovery requests, issuing responses and objections, or raising discovery disputes before the courts."); *Henry v. Morgan's Hotel Grp.*, No. 15–CV–1789, 2016 WL 303114, at *3 (S.D.N.Y. Jan. 25, 2016) ("The burden of demonstrating relevance remains on the party seeking discovery, but the newly-revised rule 'does not place on [that] party . . . the burden of addressing all proportionality considerations.'"); *Carr v. State Farm Mut. Auto. Ins. Co.*, 312 F.R.D. 459, at *468-469 (N.D. Tex. 2015) ("a party seeking to resist discovery . . . still bears the burden of making a specific objection and showing that the discovery fails the proportionality calculation mandated by Rule 26(b) . . . . The party seeking discovery. . . may well need to . . . make its own showing of many or all of the proportionality factors").

20 *See, e.g., Sprint Commc'n Co. L.P. v. Crow Creek Sioux Tribal Ct.*, No. 4:10-CV-04110-KES, 2016 WL 782247, at *5 (D.S.D. Feb. 26, 2016) ("The requesting party must make a threshold showing that the requested information falls within the scope of discovery under Rule 26(b)(1). . . . [T]he burden then shifts to the party resisting discovery to show specific facts demonstrating that the discovery is irrelevant or disproportional."); *Eramo v. Rolling Stone LLC*, No. 3:15mc11, 2016 U.S. Dist. LEXIS 8590, at *13 (W.D. Va. Jan. 25, 2016) (discovery request granted where requesting party "made a prima facie showing of relevance and proportionality" that was not sufficiently refuted by" the responding party); *Matthew Enter., Inc. v. Chrysler Grp., LLC*, No. 13-cv-04236, 2015 WL 8482256, at*1 (N.D. Cal. Dec. 10, 2015) ("Once the moving party establishes that the information requested is within the scope of permissible discovery, the burden shifts to the party opposing discovery.").

21 *See, e.g., Wilmington Tr.*, 2016 U.S. Dist. LEXIS 28762, at *7 ("how costly or time-consuming responding to a set of discovery requests will be . . . is ordinarily better known to the responder than the requester. . . . [T]he requesting party can explain as well as the responder - and perhaps better - why the information it is seeking is important to resolving the case and why it would be a good use of the other party's resources to search for it"); *Carr*, 312 F.R.D. at *468-469 (identifying certain of listed proportionality factors that each party may need to address). *See also* Rule 26, 2015 Committee Notes ("A party requesting discovery, for example, may have little information about the burden or expense of responding. A party requested to provide discovery may have little information about the importance of the discovery in resolving the issues as understood by the requesting party.").

22 *Compare* Rule 37(e) *with* Rule 37(a)(5) (requiring or permitting payment of "reasonable expenses incurred" in making or opposing a motion to compel) *and* Rule 37(b)(2)(C) (permitting payment of "reasonable expenses . . . caused by the failure" to comply with a court order) *and* Rule 37(c)(1)(A) (permitting payment of "reasonable expenses. . . caused by the failure" to disclose or supplement as required by Rule 26(a) or (e)) *and* Rule 37(d)(3) (permitting payment of "reasonable expenses . . . caused by the failure" to respond to a discovery request).

23 Rule 37(e)(1) ("upon finding of prejudice to another party from loss of information, [the court] may order measures no greater than necessary to cure the prejudice").

24 *See* Thomas Y. Allman, *Amended Rule 37(e): Rationalizing the Spoliation Doctrine*, The Sedona Conference (Mar. 4, 2016) ("under subdivision (e)(1), courts may impose . . . what appears to be a virtually automatic award of expenses and fees associated with bringing the motion").

25 Rule 37(e)(2).

26 Rule 37, 2015 Committee Notes.

27 *Cat3*, 2016 WL 154116, at *8-9.

28 *Id.*, at *9-10.

A separate but related question is whether monetary sanctions under Rule 37(e)(1) can appropriately be issued *against counsel*, as opposed to the offending party. Again, Rule 37(e) is silent on this issue (unlike Rules 37(a), (b) and (d), each of which authorizes monetary sanctions to be issued against the offending party, "the attorney advising" the party, or both). The *Cat3* court suggested that sanctions against counsel might be appropriate. *See Cat3*, 2016 WL 154116, at n.7 (without citing authority, promising to "apportion responsibility" for attorneys' fees and costs between plaintiff and their counsel if culpability of counsel was shown). But the issue may be complicated by precedent suggesting that Rule-based attorney-directed sanctions are not appropriate absent explicit authority. *See Sun River Energy v.*

Nelson, 800 F.3d 1219, 1226 (10th Cir. 2015) (reversing as "overbroad" an interpretation of Rule 37(c)(1) extending sanctioning authority to counsel when the Rule was silent on the issue; concurring with *Grider v. Keystone Health Plan Cent., Inc.*, 580 F.3d 119, 141 (3d Cir. 2009); *Maynard v. Nygren*, 332 F.3d 462, 470 (7th Cir. 2003)).

29 *Best Payphones*, 2016 U.S. Dist. LEXIS 25655, at *28-29.

30 *Id.* at *30.

31 In addition to the grounds described above, both courts also suggest that the relief granted would alternatively have been warranted under the court's inherent authority. *Best Payphones*, 2016 U.S. Dist. LEXIS 25655, at *28-29 ("The Court has discretion to award attorneys' fees and costs in connection with spoliation motions to punish the offending party for its actions and deter the litigant's conduct, sending the message that egregious conduct will not be tolerated.") (internal quotations omitted); *Cat3*, 2016 WL 154116, at *10. ("If the plaintiffs were correct that Rule 37(e) is inapplicable here, relief would nonetheless be warranted under the Court's inherent power."). The issue of a court's inherent authority to impose spoliation sanctions after Rule 37(e) is discussed *infra*.

32 Rule 26, 2015 Committee Notes.

33 *Id.*

34 *See, e.g., Haines v. Cherian*, No. 1:15-cv-00513, 2016 U.S. Dist. LEXIS 24522, at *5 (M.D. Pa. Feb. 29, 2016) ("discovery . . . may encompass that which appears reasonably calculated to lead to the discovery of admissible evidence") (quoting *Clemens v. N.Y. Cent. Mut. Fire Ins. Co.*, 300 F.R.D. 225, 226 (M.D. Pa. 2014)); *United States ex rel. Shamesh v. CA, Inc.*, 93 Fed. R. Serv. 3d 1317, (D.D.C. 2016) ("Like before, relevance is still to be 'construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on' any party's claim or defense") (citing *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978), which interpreted the "subject matter" language in the Rule in 1978); *Zbylski v. Douglas Cty. School Dist.*, No. 14-cv-01676-MSK-NYW, 2015 WL 9583380, at *7 (D. Colo. Dec. 31, 2015) ("Rule 26(b) permits discovery 'regarding any nonprivileged matter that is relevant to any party's claim or defense' or discovery of any information that 'appears reasonably calculated to lead to the discovery of admissible evidence,' so long as it is proportional to the needs of the case.") (citing revised Rule); *Lightsquared Inc. v. Deere & Co.*, No. 13 Civ. 8157, 2015 U.S. Dist. LEXIS 166403, at *7 (S.D.N.Y. Dec. 10, 2015) ("While discovery no longer extends to anything related to the 'subject matter' of the litigation, relevance is still to be 'construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on' any party's claim or defense.") (quoting *Oppenheimer*); *La. Crawfish Producers Ass'n - West v. Mallard Basin, Inc.*, Nos. 6:10-1085, 6:11-04612015, U.S. Dist. LEXIS 163230, at *10 (W.D. La. Dec. 4, 2015) ("The term 'relevant' in Rule 26 is 'construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.'") (quoting *Oppenheimer*).

35 *See, e.g., Pertile v. Gen. Motors, LLC*, No. 1:15-cv-00518-WJM-NYW, 2016 WL 1059450, at *2 (D. Colo. Mar. 17, 2016) ("'might yield helpful information' is not the applicable standard" for discovery); *Dao*, 2016 WL 796095, at *2 ("amendments to Rule 26 deleted language that permitted discovery of any information that 'might lead to the discovery of admissible evidence'"); *ArcelorMiital Ind. Harbor LLC v. Amex Nooter*, LLC, No. 2:15-CV-195-PRC, 2016 U.S. Dist. LEXIS 18211, at *10-11 (N.D. Ind. Feb. 16, 2016) (noting the deletion of the "reasonably calculated" language from the revised Rule and explaining the rationale behind the deletion); *O'Boyle*, 2016 U.S. Dist. LEXIS 16642, at n.3 (noting that plaintiff "mistakenly invoked the 'reasonably calculated to lead to discovery of admissible evidence' standard of the prior version of Rule 26(b)(1)" and pointing out that the recent amendment to the Rule "eliminated that language"); *Gilead Sci.*, 2016 WL 146574, at *1 ("No longer is it good enough to hope that the information sought might lead to the discovery of admissible evidence. In fact, the old language to that effect is gone."); *Sibley*, 2015 WL 9413101, at *3 ("Notably absent from the present Rule 26 is the all too familiar, but never correct, iteration of the permissible scope discovery as including all matter that is 'reasonably calculated to lead to' the discovery of admissible evidence. . . . [T]he new Rule disposes of this language, ending the incorrect, but widely quoted, misinterpretation of the scope of discovery."); *Polyone Corp. v. Lu*, No. 14 C 10369, 2015 WL 9489915, at *2 (N.D. Ill. Dec. 30, 2015) (noting that "Rule 26(b)(1) was amended to eliminate the court's discretion to expand discovery to the subject matter of the action.")

36 *See e.g.*, James M. Beck, *Discovery – Oppenheimer's Half Life Has Long Been Exceeded*, Drug and Device Law Blog (Apr. 25, 2016), available at http://druganddevicelaw.blogspot.com/2016/04/discovery-oppenheimers-half-life-has.html; John M. Barkett, *The First 100 Days (or so) of the 2015 Civil*

Rules Amendments, Bloomberg BNA—Digital Discovery & e-Evidence Report (Apr. 14, 2016), available at http://www.bna.com/first-100-days-n57982069891/; Kevin F. Brady, Dennis J. Canty, Aaron Crews, Megan E. Jones, Hon. Elizabeth D. Laporte, Robert D. Owen, *The Scope of Discovery: What, If Anything, Has Changed?*, Sedona Conference Institute Program on eDiscovery, Panel Discussion (Mar. 17, 2016).

37 Advisory Committee on the Federal Rules of Civil Procedure Memorandum to Standing Committee on Rules of Practice and Procedure, June 2014, at 9.

38 Standing Committee Report, Sep. 2014, at 15.

39 Rule 37, 2015 Committee Notes. The Notes do not expound on what those "certain measures" are, but presumably, they include – at least – each of those specifically set forth in the revised Rule, *i.e.*, a judicial presumption that lost ESI was unfavorable to the party, a permissive or mandatory adverse inference instruction, and dismissal or default judgment. *See* Rule 37(e)(2)(A)-(C).

40 *Cat3*, 2016 WL 154116, at *7.

41 *Orchestratehr, Inc. v. Trombetta*, No. 3:13-cv-2110-P, 2016 WL 1555784, at *10 (N.D. Tex. Apr. 18, 2016); *Friedman v. Phil. Parking Auth.*, No. 14-6071, 2016 U.S. Dist. LEXIS 32009, at *23 (E.D. Pa. Mar. 10, 2016); *InternMatch, Inc. v. Nxtbigthing, LLC*, No. 14-cv-05438-JST, 2016 WL 491483, at *3-4 (N.D. Cal. Feb. 8, 2016); *DVComm, LLC v. Hotwire Commc'n.*, No. 14-5543, LLC, 2016 U.S. Dist. LEXIS 13661, at *18 (E.D. Pa. Feb. 3, 2016); *Cat3, LLC*, 2016 WL 154116, at *6-7 (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991)).

42 *Orchestratehr*, 2016 WL 1555784, at *10 ("the conduct at issue in this motion is covered by" revised Rule 37(e)); *Friedman*, 2016 U.S. Dist. LEXIS 32009, at *24 (describing order as Rule 37(a) "mandatory sanctions"); *InternMatch,* 2016 WL 491483, at *n.6 (analyzing willfulness and bad faith of defendant's conduct according to case law standard for imposing sanctions under inherent power, but finding that "Defendants' conduct was willful and in bad faith, and that defendants 'acted with the intent to deprive another party of the information's use in the litigation.'"); *DVComm*, 2016 U.S. Dist. LEXIS 13661, at *18 ("As we find substantial evidence DVComm destroyed ESI under Rule 37(e)(2), we do not examine our ability to impose additional non-monetary sanctions under our inherent power."); *Cat3, LLC*, 2016 WL 154116, at *11 ("The relief outlined here satisfies the dictates of Rule 37(e)(2) and . . . is also consistent with Rule 37(e)(1)").

43 *InternMatch,* 2016 WL 491483, at *n.6. *But see FiTeq Inc. v. Venture Corp.*, No. 13-cv-01946-BLF, 2016 WL 1701794 (N.D. Cal. Apr. 28, 2016) (refusing to give permissive adverse inference instructions under Rule 37(e) and seemingly – but not explicitly – accepting defendant's argument that inherent authority to sanction for lost ESI has been foreclosed by Rule 37(e)).

44 *See* Jesse E. Weisshaar and Mark W. Cowing, *Amendments to Discovery Rules: How Will You Be Affected?*, Bloomberg BNA—Digital Discovery & e-Evidence Report, at 8-9 (Nov. 26, 2015), available at http://www.shb.com/~/media/files/professionals/weisshaarjesse/bloomberg-bna-amendments-to-discovery-rules.pdf?la=en.

45 *Marten Transp.*, 2016 U.S. Dist. LEXIS 15098, at *31. *Cf. Zbylski,* 2015 WL 9583380, at *11 ("Once it is established that a party's duty to preserve has been triggered, the inquiry into whether a party has honored its obligation to preserve evidence turns on reasonableness, which must be considered in the context of whether what was done-or not done-was proportional to that case and consistent with clearly established applicable standards.") (internal quotations omitted; citing case law pre-dating Dec. 2015 Rules amendments).

46 *Marten Transp.*, 2016 U.S. Dist. LEXIS 15098, at *30-31.

47 *See, e.g.,* Aaron Crews, Bradley Ellis, Jarone J. English, Taylor M. Hoffman, Karin S. Jenson, Cecil A. Lynn III, *In-House Litigation Counsel Roundtable: Will the New Rules Really Help?*, Sedona Conference Institute Program on eDiscovery, Panel Discussion (Mar. 18, 2016); Metropolitan Corporate Counsel, *A Civil Rules Roundtable: The Burden Shifts to the Judges* (Dec. 1, 2015) (interviewing John K. Rabiej, Dir. of the Center for Judicial Studies at Duke Law School); Tera Brostoff, *New Rules on eDiscovery Take Effect Next Week*, Bloomberg BNA—Digital Discovery & e-Evidence Report (Nov. 23, 2015) (describing panel discussion involving "eDiscovery experts and judges" at Georgetown's Advanced eDiscovery Institute on Nov. 19, 2015).

48 This alert does not attempt to address all such questions, focusing instead on the major questions, answers to which may drive resolution of less significant or more case-specific questions relating to application of the Rules.