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Ending the Tendency to Over-Preserve ESI

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Texas litigators should mark Dec. 1, 2015, on their calendar as a red-letter day. That's when a number of amendments to the Federal Rules of Civil Procedure are likely to become effective, including a new version of Rule 37(e) related to the preservation of electronically stored information (ESI).

Consideration of the proposed amendments has been ongoing for the past four years. An advisory committee to the Judicial Conference, formed to develop rules amendments, issued its proposals in August 2013 and then held three public hearings around the country, where it heard more than 120 witnesses. A special mini-conference was held in Dallas, where 25 judges, lawyers and academics discussed possible approaches to the new ESI rule. The proposed changes have yet to receive U.S. Supreme Court approval, but if approved and Congress does not object, they are expected to go into effect in December 2015.

As a whole, the proposed amendments are intended to improve the disposition of civil cases by reducing costs and delays in civil litigation. The challenges and cost of preserving and producing ESI have been well documented. In that regard, the committee concluded that the lack of clear standards causes litigants to expend "excessive effort and money" on preserving ESI to avoid the risk of sanctions.

Current Rule 37(e) provides that "absent exceptional circumstances" a court cannot impose sanctions for ESI lost as a result of "the routine, good faith operation of an electronic information system." This safe-harbor applies only if the loss of ESI was in good faith. In the absence of a more detailed rule, significant differences have emerged among federal courts in addressing the loss of ESI. For example, in some circuits, severe sanctions such as adverse jury instructions can be imposed for the negligent loss of ESI while others, including the Fifth Circuit, require a showing of bad faith.

Proposed Rule 37(e) seeks to promote greater uniformity among courts by specifying the appropriate actions that may be taken in response to a failure to preserve ESI. The proposed rule is triggered where the court finds that ESI that should have been preserved in the anticipation or the conduct of litigation is lost because a party failed to take reasonable steps to preserve the ESI. According to its drafters, the proposed rule does not create a new duty to preserve. Instead, it adopts the duty to preserve as established by case law, which holds that a duty to preserve ESI arises when litigation is reasonably anticipated.

As explained by the committee, preservation efforts require reasonable steps, not perfection. A party's efforts should be weighed in light of its sophistication and the proportionality of the preservation efforts to its resources. Thus, a party with significant experience in litigation may be held to higher standards than those less familiar with preservation obligations.

Upon a finding that a party failed to take reasonable steps, the next focus should be on whether the lost ESI can be restored or replaced through additional discovery. To that end, courts may use their powers under Rules 16 and 26 to order discovery, taking into account the relevance of the information.

In circumstances where the ESI should have been preserved, reasonable steps to preserve the ESI were not taken, and the information cannot be replaced, then the remedial provisions of proposed subsections (e)(1) and (e)(2) come into play. By focusing on different aspects of ESI loss, these two provisions afford a broad spectrum of corrective actions.

Proposed Rule 37(e)(1) is the less stringent of the two potential remedies. It provides that where a party has been prejudiced by the loss of ESI, the court may order measures "no greater than necessary to cure the prejudice." According to the committee, this proposal is intended to preserve the broad discretion of trial courts to provide remedies for the loss of ESI, provided the measures are no greater than necessary to cure the prejudice. Consistent with this framework, a court may not attempt to cure prejudice under subsection (e)(1) by imposing the more severe measures in subsection (e)(2), which address bad faith loss of ESI.

A key aspect of subsection (e)(1) is that it does not take a position on which party bears the burden of proving (or disproving) prejudice. During the public comment process, many litigants expressed concerns that demonstrating the full extent of prejudice was impossible where the lost ESI was never seen. The committee again deferred to the experience of trial courts, recognizing that in some circumstances the content of lost ESI may be fairly evident but in others may be unknown to the complaining party.

In contrast, proposed subsection (e)(2) authorizes the court to impose far more severe sanctions. These apply where in addition to the other requirements of the new rule, the court also finds that a party has acted with the "intent to deprive" another party of the use of ESI. In that event, the court may impose three specified sanctions: 1. an adverse inference instruction that the jury must or may presume the ESI was unfavorable to the party; 2. presume that the lost information was unfavorable; or 3. dismiss the action or enter a default judgment.

A primary purpose of subsection (e)(2) is to eliminate the existing circuit split on when an adverse inference jury instruction may be given for the loss of ESI. By requiring a showing that a party acted intentionally, the new rule rejects those cases where sanctions have been imposed on a finding of negligence or gross negligence. The new rule adopts a standard akin to bad faith, which is the long-standing rule in the Fifth Circuit.

These sanctions are to be used with caution, according to the committee. Even if the loss of ESI was intentional, subsection (e)(2) sanctions should not be applied where the lost ESI was relatively unimportant or where a lesser measure under subsection (e)(1) is sufficient to cure the loss.

Despite these important changes, rest assured that more ESI discovery issues will arise in the future. The volume of ESI continues to grow at an exponential rate. According to an industry expert relied upon by the committee, there will be 26 billion devices on the Internet within six years with a concomitant increase in stored information. The new Rule 37(e) represents an important step in meeting that challenge, but is unlikely to be the final word.

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