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Advocacy in E-Discovery More Important Than Ever

In this day and age, advocacy starts with competence in ESI issues. An effective advocate must be able to assess e-discovery needs and issues, implement appropriate preservation procedures, advise clients on options for storage and preservation, understand the client's ESI systems and storage, and handle the management, review and production of ESI in litigation. But this knowledge by itself is not enough. Only with an understanding of how the amendments to the Federal Rules account for issues pertaining to ESI can the attorney meaningfully advocate for the client.

Relevance and Proportionality Defines the Scope of Discovery

One of the major changes to the rules is the deletion of the phrase "reasonably calculated to lead to the discovery of admissible evidence" in Rule 26. That language was previously used to describe the test for relevance, but it was often incorrectly applied to define the scope of discovery to the point where it swallows any limitation on the scope of discovery. The new test now emphasizes proportionality, and the relevant case law informing the scope of discovery going forward will increasingly be that which applies the new rules. *See In re Bard IVC Filters Prod. Liab. Litig.*, 317 F.R.D. 562, 564 (D. Ariz. 2016) ("[J]ust as a statute could effectively overrule cases applying a former legal standard, the 2015 amendment effectively abrogated cases applying a prior version of Rule 26(b)(1)").

First, attorneys should perform a comprehensive early-stage assessment of their cases. They should candidly evaluate the strengths and weaknesses of the claims and defenses, and determine what evidence to present at trial. This way, attorneys can design and implement the most efficient, effective discovery plan. This forces attorneys to be thoughtful about the claims and defenses they want to assert so as to not expand the scope of discovery beyond what is good for the client. For example, attorneys should avoid pushing a claim or counterclaim that has a low probability of success, because doing so may expose the client to burdensome and expensive discovery on an unimportant issue.

With this in mind, it is important for attorneys to implement the new rules in a way that furthers the interests of the client. The rule amendments underscore the notion that the Rules require all parties to work together in a cooperative and proportional way by (1) considering costs, the parties' resources, burdens and importance of issues, and (2) communicating early and often about what is actually in dispute and what is necessary to resolve the dispute. *See* Fed. R. Civ. P. 1 (amended to require that "the court and the parties" use the Rule to secure the just, speedy and inexpensive determination of every action and proceeding); Fed. R. Civ. P. 16(b)(1) committee notes (promotes "direct simultaneous communication" between parties). This starts by being transparent in the initial stages of the discovery process by disclosing the search methodology, locations and rationale in preparing the client's responses to discovery requests, and justifying your methods under the proportionality principles emphasized under the new rules. For example, attorneys can explain the keyword searches being used in specific data systems for specific custodians.

Be Specific in Seeking Discovery

Attorneys should leverage the New Rules to promote efficiency. Rule 26(d)(2) permits a party to serve requests for production under Rule 34 before the Rule 26(f) conference. Therefore, attorneys may want to serve discovery requests before the Rule 26(f) conference to work through any issues, discuss valid objections and negotiate the scope of discovery at the 26(f) conference itself. In other words, attorneys can make the Rule 26(f) conference productive. Rule 26(d)(3) allows parties to stipulate to case-specific sequences of discovery (rather than only on motion or order). And the Rule 26(f) conference/plan must include parties' views on preservation of ESI.

Attorneys can best serve their clients by demonstrating to the court that they are conducting discovery in good faith; this will ultimately help their clients and give the judge more reason to believe that parties are reasonable and forthright. The most fundamental way to do this is to serve narrowly tailored and targeted discovery requests. Parties often serve their adversaries with long lists of broad, vague and burdensome requests, which violate the new Federal Rules and may lead less patient judges to deny not only unnecessary requests, but also necessary ones that can get conflated in the mix of overly burdensome requests. A court is more likely to enforce narrowly tailored requests and lead to the discovery of important evidence. *See Elec. Pension Fund v. Bank of Am. Corp.*, No. 14-Civ.-7126 (JMF), 2016 WL 6779901, at *3 (S.D.N.Y. Nov. 16, 2016) (discovery request seeking "all documents" by its very nature "falls short" on proportionality principles under Rule 26).

Draft discovery requests and responses assuming the judge will see them. If there is a dispute, the judge will review them, and having reasonable, defensible positions will benefit you and your client. Additionally, overly expansive requests can also be strategically harmful because they give adversaries the opportunity to bury important documents among thousands or millions of irrelevant ones. Seek discovery in a manageable way in order to avoid wasting time and money. If the advocate fails to limit the scope of discovery, the cost of collecting, managing and reviewing documents can snowball into exorbitant sums. *See Ciuffitelli v. Deloitte & Touche LLP*, 2016 WL 6963039, at *5 (D. Or. Nov. 28, 2016) ("The 2015 amendment calls for renewed consideration of the time and money litigants must expend on discovery, and for courts to impose reasonable limits on discovery through the common-sense concept of proportionality.")

Be Specific in Objections When Responding to Discovery

New Rule 34(b)(2)(C) requires specificity about whether any responsive documents are being withheld on the basis of an objection. Judges have always disdained and been critical of boilerplate objections. *See, e.g., Buskirk v. Wiles*, No. 15-Civ.-03503, 2016 WL 7118288, at *2 (S.D.W. Va. Dec. 6, 2016) ("[O]bjections to Rule 34 requests must be stated specifically and boilerplate objections regurgitating words and phrases from Rule 26 are completely unacceptable."); *Menell v. Rialto Unified Sch. Dist.*, 15-Civ.-2124 (VAP) (KKX), 2016 WL 3452920, at *4 (C.D. Cal. June 20, 2016) ("Defendant's boilerplate relevance and vagueness objections to each request are improper and not well-taken.").

Now, "with the advent of the 2015 amendments to Rule 26, the days of boilerplate objections are over." *Kruse v. Regina Caeli, Inc.*, No. 16-10304, 2016 WL 3549361, at *1 (E.D. Mich. June 30, 2016) (dismissing boilerplate interrogatory objections, "each of which repeats the [same] formulaic phrase."). Under new Rule 34(b)(2)(C), attorneys must state specifically what information is being withheld on the basis of any objection. *See Sperling v. Stein Mart, Inc.*, 15-Civ.-1411 (BRO) (KKX), 2017 WL 90370, at *2 (C.D. Cal. Jan. 10, 2017) ("general or boilerplate objections such as 'overly burdensome and harassing' are improper – especially when a party fails to submit any evidentiary declarations supporting such objections."). Simply put, "generalized objections … do not comply with the Federal Rules of Civil Procedure." *Wellin v. Wellin*, – F.Supp.3d –, No. 13-Civ.-1831-DCN, 2016 WL 5539523, at *3 (D.S.C. Sept. 30, 2016).

Attorneys may be prone to include boilerplate objections without detailing the specific bases for any valid objections, thinking that doing so serves as a precautionary measure to preserve the right to invoke any objection later, when in fact, the opposite may be true. Failure to be specific in discovery objections may actually result in waiver of any objections. *See Fischer v. Forrest*, – F.Supp.3d –, 2017 WL 773694, at *3 (S.D.N.Y. Feb. 28, 2017) ("Any discovery response that does not comply with [amended] Rule 34's requirement to state objections with specificity … will be deemed a waiver of all objections[.]"). *See also State Farm Fire & Cas. Co. v. Admiral Ins. Co.*, – F.Supp.3d –, 15-Civ.-2745 (RMG), 2016 WL 8135417, at *7 (D.S.C. Feb. 4, 2016) ("boilerplate, general objections standing alone waive any actual, specific objections."); *Schultz v. Sentinel Ins. Co., Ltd.*, 15-Civ.-04160 (LLP), 2016 WL 3149686, at *7 (D.S.D. June 3, 2016) ("boilerplate general objections fail to

preserve any valid objection at all because they are not specific to a particular discovery request ..."); *Arrow Enter. Computing Sols., Inc. v. BlueAlly, LLC*, 15-Civ.-0037 (FL), 2016 WL 4287929, at *3 (E.D.N.C. Aug. 15, 2016) (Defendants' objections "are nothing more than boilerplate objections: they fail to specify why the requested documents are not relevant to a party's claim or defense and not proportional to the needs of the case.").

Understanding the Remedial Measures for Lost ESI Under Rule 37(e)

In 2006, the Federal Rules were amended to limit the circumstances under which sanctions could be imposed for failing to preserve ESI. It provided a safe harbor for the loss of ESI that occurred in good faith. But with the exponential growth in the volume of ESI, the circuit courts had established significantly different standards for imposing punitive sanctions or curative measures under similar circumstances.

New Rule 37(e) was drafted to incorporate specific remedial measures to minimize the inconsistencies across federal courts in addressing the failure to preserve ESI. It authorizes and specifies measures a court may employ if electronically stored information (ESI) that should have been preserved is lost, as well as specifies the findings necessary to justify these measures. Upon a finding of prejudice, the court may order measures no greater than necessary to cure that prejudice (e.g., excluding item of evidence to offset prejudice, jury instructions to assist in evaluation of evidence). Upon finding intent to restrict another party's use of ESI, the court may presume information was unfavorable, may instruct the jury that lost information was unfavorable (i.e., adverse inferences), or may dismiss the case or enter a default judgment.

But some courts misapply new Rule 37(e) or do not give it proper consideration. For example, in *Brice v. Auto-Owners Ins. Co.*, 2016 WL 1633025 (E.D. Tenn. Apr. 21, 2016), the court granted an adverse inference under pre-2015 Sixth Circuit authority for negligent deletion of email and text messages, without consideration of Rule 37(e). Had the court applied Rule 37(e), then it is unlikely that it would have imposed an adverse inference for "negligent" conduct, *id*. at *6, without finding an "intent to deprive" required under Rule 37(e) to impose an adverse inference.

Although it may be tempting to seek or impose harsh sanctions for failing to preserve ESI, the new rule details exercising certain measures under specific findings as appropriate, and the absence of such findings should lead the court to exercise restraint. For example, in *Wal-Mart Stores, Inc. v. Cuker Interactive, LLC*, 2017 WL 239341 (W.D. Ark. Jan. 19, 2017), the court chided plaintiff Wal-Mart for "very poor practice" in wiping the laptop when it knew "litigation was looming," but still declined to impose sanctions where alleged prejudice resulting from loss of Wal-Mart's ESI (in former employee's laptop) was speculative. The court acknowledged that "[w]hether to impose discovery sanctions is a decision committed to this Court's discretion, but the scope of that discretion narrows as to the severity of the sanction increases." *Id*. at *1.

Effective Advocacy May Involve Educating Your Adversary and/or the Court

Despite the fact that the changes were implemented in 2015, many jurists and attorneys are unfamiliar with how the rule changes should affect discovery on a practical level. *See, e.g.*, *Cole's Wexford Hotel, Inc. v. Highmark Inc.*, – F.Supp.3d – , No. 10-Civ.-1609, 2016 WL 5025751, at *1 (W.D. Pa. Sept. 20, 2016) (special master erred in considering "relevancy to be as broad as the subject matter, which is broader than the scope of discovery contemplated by [amended] Rule 26," which now requires consideration of "proportionality"). Lawyers should understand the new rules, encourage early and active judicial management, and make it a point to express the purpose of the rule changes. "For Rule 26(b)(1)'s proportionality mandate to be meaningful, it must apply from the onset of a case. Imposing proportionality only after motion practice establishes the viability of the parties' claims or defenses would thwart that purpose." *Ciuffitelli v. Deloitte & Touche LLP*, 2016 WL 6963039, at *5 (D. Or. Nov. 28, 2016).

It is important to set the tone of being fair and reasonable from the beginning. This should be done first at the Rule 26(f) conference between the parties and again early in the case at the pretrial conference mandated under Rule 16. Attorney should use the Rule 16 conference as a substantive hearing to map out discovery, which can serve as an opportunity to integrate the local rules/practice with the new Federal Rules to advance the purpose of the rule amendments in any action. *See Card v. Principal Life Ins. Co.*, 2016 WL 1298723, at *5 (E.D. Ky. Mar. 31, 2016) ("Consistent with the recently amended FRCP, the Court believes a pretrial conference would provide the best forum for expediting disposition of this action. The conference will address the permissible scope of discovery[.]").

At the first case management conference, invite the judge to direct discussions with parties to formulate the scope of relevance and productions. Communicate with the court early and often in attempts to engage the adversary in cooperative discussions on the scope of discovery. If the judge is not familiar with the new rules that should govern such discussions, then provide the court with the background, commentary and law it needs in order to apply the new rules effectively. It may be helpful to refer to sources of national thought leadership, such as Sedona materials, scholarship from other judges or the Manual for Complex Litigation published by the Federal Judicial Center.

Judges who involve themselves in early case management benefit from doing so. Early case management helps minimize the time and resources the court would later expend on dealing with discovery disputes. Setting forth expectations and clearly defining the scope of discovery under the new standards promote efficiency and quicker resolution of cases on the court's docket. A hands-on approach from the judge also signals to the parties that gamesmanship in discovery will not be tolerated. Courts should keep in mind, and lawyers may need to remind the court, that "[t]he amendment [to] Rule 26(b)(1) was intended to encourage judges to be more aggressive in identifying and discouraging discovery overuse by emphasizing the need to analyze proportionality[.]" *Certain Underwriters at Lloyd's v. Nat'l R.R. Passenger Corp.*, – F.R.D. –, 2016 WL 7017356, at *5 (E.D.N.Y. Nov. 30, 2016).

Some courts may nevertheless remain reluctant to get involved with or seriously address discovery disputes. Therefore, it is important that the attorney maximize the utility of the new rules by proactively working with opposing counsel to address thorny issues before disputes and problems arise. That should start with making productive use of the Rule 26(f) conference and Rule 16 pretrial conference, as discussed above. Be fair, forthright and transparent. In leading by example, the lawyer establishes the moral ground to demand that the adversary reciprocate in kind. Ultimately, all judges respond to practical and commonsense approaches advocated by lawyers who have established their credibility by being reasonable in negotiations and knowledgeable about the current rules/law.

For further information regarding advocacy in e-discovery please contact any member of BakerHostetler's E-Discovery Advocacy and Management team or the national leader Ted Jacobs at ejacobs@bakerlaw.com or 212.589.4674.

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