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FRCP: Playing by the New Rules

Amendments driving predictability and proactivity

Interview: Jennifer Brennan / iDiscovery Solutions, Inc., Hon. Mitchell D. Dembin / U.S. Magistrate Judge for the Southern District of California & Ruth Hauswirth / Cooley LLP

The amended Federal Rules of Civil Procedure went into effect a little over a year ago now, and experience and case law are growing. We checked in with three experts who bring differing on-the-ground vantages to discovery practice and procedure: ***Hon. Mitchell D. Dembin****, a U.S. Magistrate Judge for the Southern District of California;* ***Ruth C. Hauswirth****, Special Counsel and Director of Cooley's Litigation and eDiscovery Services Department; and* ***Jennifer A. Brennan****, a Director at iDiscovery Solutions in Washington D.C. Their remarks have been edited for length and style.*

MCC: Let's start with Rule 26(b)(1), which thrusts proportionality into the spotlight. Tell us what has changed in the federal rules and how it is playing out in courts and conference rooms.

Brennan: Rule 26(b)(1) requires that discovery be both relevant to claims and defenses and proportional to the needs of the case. Proportionality, however, is not a new concept. The previous rule gave courts the power to narrow the scope of discovery of relevant information if the cost outweighed the utility. With the 2015 amendments, the proportionality factors were reordered and moved up within the rule to form the very definition of permissible discovery. The reordering makes it clear that monetary stakes are not the only consideration, or even the first consideration, in assessing proportionality. The first consideration is the "importance of the issues at stake." Courts are applying the 2015 amendments to define the scope of discovery more narrowly and to limit discovery to what is really needed in the case. Attorneys should to be aware of the courts' shifting mindset about what constitutes discoverable information.

Hauswirth: In addition to moving proportionality to a more prominent position in the rule, the amendments clarify the relevancy standard by removing certain language from Rule 26(b)(1). The amended rule, in defining the scope of discovery as non-privileged information relevant to any party's claims or defenses, removes the reference to "the subject matter of the dispute," as well as the frequently cited language regarding whether information is "reasonably calculated to lead to the discovery of admissible evidence."

The Advisory Committee Notes are a great help in understanding the intent behind the changes to the rules. With respect to the removal of the "reasonably calculated" language, the Committee Notes explain that the language was intentionally removed because: "The phrase has been used by some, incorrectly, to define the scope of discovery" and because it has "continued to create problems" regarding the scope of discoverable information. The language was replaced with a direct statement that "Information within the scope of discovery need not be admissible in evidence to be discoverable."

There have been cases in which courts emphasized the need to cite to the new rule and lawyers have been sanctioned for continuing to use the "reasonably calculated" language. For example, in *Fulton v. Livingston Financial*, out of the Western District of Washington, Defendants who filed a motion to compel citing relevance case law that predated the amendments were found to have "misstate[d] the law." The court imposed sanctions and ordered Defendants to pay Plaintiffs' fees and costs incurred in opposing the motion and ordered the attorney to disclose the sanction if, at any time in the next five years, he was again threatened with sanctions in federal court.

> ***Folks within the e-discovery bubble have been raising issues of preservation and proportionality for years, but that remains an insular group of attorneys.***
>
> ***– Jennifer Brennan***

The takeaway is that it's important to update forms and make sure people are focused on the new rules.

MCC: Judge Dembin, with proportionality now front and center in the rules, what are you seeing from the bench?

Dembin: My views are based on my experience, and the experiences of my colleagues, here in the Southern District of California, along with my position on the Executive Board of the Ninth Circuit Magistrate Judges. The only discernible impact that we have seen so far is that proportionality has been moved into the

Jennifer A. Brennan, *a Director at iDiscovery Solutions (iDS) in Washington D.C., has over 20 years of law firm and consulting experience overseeing all aspects of complex matter management. She can be reached at jbrennan@idiscoverysolutions.com.*

boilerplate objection section for many litigators, which is not necessarily a positive thing. In a few cases, we are seeing that proportionality has given lawyers something else to fight about, which also isn't necessarily a positive thing.

Magistrate Judges do not get to see the behind-the-scenes meetings in which lawyers talk with each other about whether requested information is relevant and proportional and come to terms between themselves. We know it's happening because there are good lawyers who care about doing things by the rules – not just the letter but the spirit – and resolve disputes without court involvement. From the bench side, we're seeing a few hearings regarding proportionality and some struggles with who has the initial burden and when it shifts, but in terms of real impact, we're seeing no real change yet.

Hauswirth: I agree that a lot does take place behind the scenes without court involvement. Cases from the past year discussing proportionality underscore that proportionality is a fact-dependent and case-specific analysis and inquiry. Generalities or formulaic approaches to the proportionality analysis are not useful or helpful and courts are looking for parties to "right-size" discovery appropriately to the particular dispute. This has become especially important considering the volume and various types of potentially discoverable information that is created now with electronically stored information (ESI). The rules and concepts like proportionality provide tools to do that and invite parties to craft creative solutions tailored to the dispute.

Brennan: Proportionality considerations, while expressly listed in Rule 26(b)(1), permeate all aspects of discovery, including the issuance of discovery requests and responses and objections under Rule 34. Proportionality is also at the heart of Rule 1, which was amended in 2015 to make it clear that the parties and the court are responsible for the "just, speedy, and inexpensive" determination of disputes.

I've also seen proportionality arise when considering whether ESI is "not reasonably accessible" under Rule 26(b)(2). An interesting example is the case of *Elkharwily v. Franciscan Health Systems* in the Western District of Washington. Defendant argued that archived emails on backup tapes were not reasonably accessible due to cost and burden because it would require over 1,400 labor hours and $150,000 to restore. Plaintiff did not challenge Defendant's burden argument, nor did he carry the burden to demonstrate good cause why the archived emails should be produced. The court refused to order Defendant to produce the archived emails at its own expense, however, since it found that the archived emails were discoverable under Rule 26(b)(1), it ordered such discovery only if Plaintiff paid for restoration of the backup tapes

Dembin: Regarding the general notion as to whether proportionality applies across the board to discovery, the answer is absolutely. I think that has given new tools to litigants and judges for managing the discovery process. There isn't any real dispute over whether proportionality permeates discovery, it should and it does.

MCC: Judge Dembin, how has Rule 34 changed and what impact is it having on responses to discovery requests?

Dembin: I'm a huge fan of the changes to Rule 34. They're clear, they're concise, and they are eminently enforceable. That's unlike Rule 1, which is aspirational. I fully support Rule 1, but it doesn't provide any enforcement mechanism. Rule 34 is perfectly clear in requiring specificity when you are withholding something based on an objection, and in mandating provision of a date certain by which you'll provide the information if you're not ready to do it within the 30 days. I love it. Still, as recently as October of last year, 10 months into the new rule, I had two lawyers in my courtroom who were shocked – *shocked* – to learn that Rule 34 had changed. Otherwise, my experience with Rule 34 so far has been positive.

Hauswirth: The changes to Rule 34 and the changes to Rule 26 interplay with each other. Rule 34(b) makes it clear that responding parties cannot make boilerplate objections and conclusory assertions regarding burden and expense. And, amended Rule 26(b)(1) requires requesting parties to make targeted and specific discovery requests that relate to the claims and defenses and that meet both the relevance and proportionality standards. A lot turns on how both sides approach their obligations under the rules.

Again, the rules do not anticipate a formulaic response. Instead, the courts are looking to the parties to use tailored discovery requests, responses and objections to find common ground on where to start and work from there while keeping discovery proportional. Can the parties use reasonable methods like phasing and sampling of information to keep discovery proportional? Phasing can be done by custodians, data types and sources, locations and specific issues. Courts continue to send the message that they hope parties will negotiate appropriate limits themselves and handle these issues without court intervention.

> ***As was true before the new Rule 37(e), the emphasis is on reasonable steps. Perfection never was, and still is not, the standard.***
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> ***– Ruth Hauswirth***

Brennan: One of the important themes underscored by both Judge Dembin and Ruth is the need to be transparent in your discovery responses, particularly if you're considering whether to withhold documents based on proportionality. *Johnson v. Serenity Transportation*, a Northern District of California case, underscores this point. Defendant maintained that it had no obligation to produce documents that contained search terms provided by Plaintiff because it would be unreasonably duplicative and further discovery would not be proportional to the needs of the case. After looking at exemplars of withheld documents, the court found them relevant and held that a party does not have the discretion to withhold relevant responsive emails absent a showing of a disproportionate burden. It ordered Defendant to produce all non-privileged relevant documents that contained Plaintiff's search terms. Ideally this type of dispute would not have made it to the court, however, there was extensive meet and confer that didn't have a successful resolution. The lesson learned is that you should be transparent when withholding documents, state the basis for withholding them, and support your position with hard information. Unsupported assertions are not going to carry the day.

Hauswirth: The case *In re: Bard IVC Filters Prods.*, a multidistrict products liability dispute out of Arizona, provides a window into the interplay between relevancy and proportionality. There was a dispute over whether Defendant's communications with foreign regulators were

Ruth C. Hauswirth, *Special Counsel & Director of Cooley's Litigation and eDiscovery Services Department, specializes in e-discovery, document retention and information governance counseling. She can be reached at rhauswirth@cooley.com.*

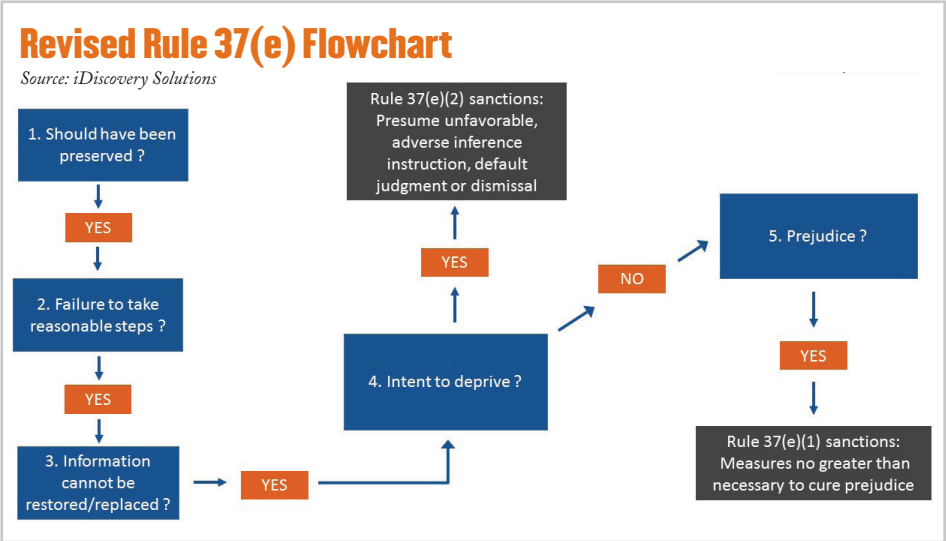
within the scope of discovery. Plaintiff sought the communications to see if Defendant's communications with foreign regulators were inconsistent with its communications with U.S. regulators. The court found that the relevancy of foreign communications was uncertain because there were no plaintiffs in the multidistrict litigation from foreign countries at that time. It also found that most of the communications with foreign regulators would likely be found in the search of ESI in the U.S. The court ultimately declined to order discovery of the foreign communications finding it disproportionate to the needs of the case because it would have required the Defendant to identify custodians and gather information in 18 different countries going back 13 years based on speculation about inconsistencies even though the communications might be marginally relevant.

MCC: Judge Dembin, are you seeing any trend toward discovery about discovery or discovery about proportionality of discovery?

Dembin: Most of us are loathe to allow discovery about discovery. That issue likely would arise only in the context of a colorable claim that discovery has been manipulated. Sometimes when there is a legitimate issue regarding lost information, you have to look into what a party did to reasonably preserve, collect, analyze and produce. In that context, discovery about discovery is necessary. On the front end, I think all of us will be strongly against allowing discovery about discovery unless and until a genuine issue is raised about a particular production.

MCC: Let's move to spoliation. Please lay out the framework for us and give us your thoughts on how the new uniform standard is working.

Dembin: The change to Rule 37(e), in particular, was designed to normalize the way the different circuits were addressing spoliation concerns. I think all of us are comfortable that it has mostly achieved what it was intended to achieve, which was to create a standardized approach, with some variations, to questions concerning sanctions for lost evidence. As all of us know, the history of 37(e) with the Advisory Committee was somewhat tortured. There remains a point of view that the way it came out overly favors the producers of information, which is typically the defense side. I suppose some of those concerns will be aired out as cases proceed to hearings and orders under Rule 37(e). But on its face, the rule does provide a framework that has been displayed in various "if/then" flowcharts (see sidebar). Has evidence been lost? Was it lost because it wasn't reasonably preserved? Can it be restored or replaced? Was there an intent to deprive or not? If there was no intent to deprive, is there prejudice? It sounds easy, and the flowchart is pretty easy to follow, but the devil is always in who has to prove what. That is where the cases are focused. For the most part, the courts have a fairly consistent view about how hearings and the nature of the evidence that has to be presented should move forward. I would think that Ruth and Jennifer would agree.



Brennan: Absolutely. One of the keys to amended Rule 37(e) is that before intent to deprive, prejudice or sanctions are even considered, there are three threshold questions to address. These questions require an examination of when the duty to preserve arose, what constitutes reasonable steps to preserve, and whether the information is available from other sources. Courts are adhering to the new framework and have declined to impose sanctions when these three threshold questions are not met. For example, in *FiTeq v. Venture Corp.*, even though the party failed to take reasonable steps after the duty to preserve arose, there were no sanctions under amended Rule 37(e) because the information could be restored and replaced from other sources.

Hauswirth: As was true before the new Rule 37(e), the emphasis is on reasonable steps. Perfection never was, and still is not, the standard. It comes down to: What are reasonable steps?

In another case out of the Northern District of California, *Matthew Enterprise v. Chrysler*, the judge said that "Rule 37(e) now provides a genuine safe harbor for those parties that take reasonable steps to preserve their electronically stored information." In that case, the court found that Plaintiff did not take reasonable steps and had a "lackadaisical" attitude toward document preservation. Plaintiff had failed to take reasonable steps to prevent email communications from being deleted when it changed email vendors and failed to notify the vendor to suspend auto-deletion.

Likewise, in *GN Netcom Inc. v. Plantronics,* a District of Delaware case, there were some reasonable steps taken at the outset, when the duty to hold was triggered, but the court ultimately found an intent to deprive based on the actions of a senior executive of the company who, after the hold was in place, sent emails telling people to delete highly relevant information. This resulted in a $3 million sanction and an adverse inference instruction.

The cases regarding preservation of ESI show how dependent the analysis is on the particular facts and circumstances. The cases and rules instruct that implementing an effective legal hold requires taking reasonable and proportional steps according to the particular circumstances and needs of the dispute to prevent the loss of relevant information. Having and following consistent processes to respond when a duty to hold arises will help keep the focus on key issues and ensure effective preservation steps are taken.

Brennan: Despite a uniform framework for evaluating whether sanctions due to spoliation should be issued, from just this handful of cases

Hon. Mitchell D. Judge Dembin, *a U.S. Magistrate Judge for the Southern District of California, previously served as an Assistant U.S. Attorney in San Diego, where he was the Cybercrime Coordinator, as Chief Security Advisor for Microsoft Corporation, and president of EvidentData, Inc., a firm specializing in computer forensics, digital evidence and computer security.*

you can see there are gray areas for further development in the law, such as situations where you have a bad actor and the corporation is otherwise adhering to its obligations. It's beneficial that we now have a standard, and that courts are applying it consistently, but it doesn't necessarily answer all of the open questions.

Another aspect of Rule 37(e) receiving attention relates to adverse inferences. Rule 37(e)(2) permits issuing an adverse inference instruction if intent to deprive the other party of information is shown. Under the amended rule, there have been cases such as *Nuvasive v. Madsen Medical* where the court, having found that there was no intent to deprive and therefore no basis for an adverse inference instruction, nevertheless allowed evidence of spoliation to go before the jury. A number of observers have opined that allowing evidence of spoliation in a jury trial is tantamount to an adverse inference instruction itself.

MCC: The amendments are influencing preservation obligations. What are you seeing?

Hauswirth: The amendments underscore the importance of information governance and litigation readiness. Companies are taking steps to manage their information from an overall retention, disposition and management standpoint. This includes legal hold response procedures to be able to respond effectively when a duty to preserve arises and legal holds that can be implemented in a timely and reasonable manner. Having solid information governance procedures positively impacts a great deal more than just legal hold response and litigation readiness goals and it is a trend that will continue.

Brennan: Courts have specifically highlighted that poor data hygiene, including absence of adequate information management systems and evidence preservation policies, can undermine the notion that reasonable steps for preservation were taken. Also, tying proportionality to preservation, it's worth highlighting that the Advisory Committee Notes mention that it may be appropriate to seek judicial guidance on preservation. I have not observed this in the case law, but perhaps Judge Dembin can comment on whether he has heard of requests for preservation orders or guidance on the scope of preservation.

Dembin: I have not seen this, and typically I would not put myself in a position of prospectively saying that a type of preservation is reasonable. That is a rat hole most judges would try to avoid. There is a difference between a judge allowing him or herself to be put in a position of saying, in advance, that something seems reasonable or doesn't, and being held to it, than lawyers talking with their magistrate judge about their plan and getting some guidance. They should feel comfortable doing that, which is not the same thing as a prospective ruling about whether what they're doing is reasonable. I recognize that is a thin line, but sometimes that's all it takes for the case to move forward smoothly.

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> ***– Hon. Mitchell D. Judge Dembin***

MCC: Let's talk about 26(g), which wasn't amended in 2015 but is important to the way discovery is handled. Tell us about 26(g) and what lawyers need to know about it.

Dembin: I think 26(g) is a hidden gem. I know that there are several magistrate judges around the country that agree with me that it is underused in terms of the court's ability to deal with certain discovery practices. I don't know how many practitioners even pay much attention to it.

The rule requires that every discovery request, response or objection be signed by at least one attorney or the party, if the party is unrepresented. That signing certifies that to the best of that person's knowledge, information and belief, formed after reasonable inquiry, that the response is accurate, truthful, complete and all that good stuff.

The rule provides its own sanction. If the certification violates the rule without substantial justification, the court, on motion or on its own – I've done that – can impose an appropriate sanction. It is a nice tool to enforce a lawyer's obligation in dealing with discovery requests or responses to ensure that the information is as good as it can be under the circumstances. There's a lot of shoddy practice. Some folks just sign these things without really considering the impact of them.

In saying that, I admit that in discovery disputes we often are dealing with some of the lowest common denominators in the practice. The good lawyers, the lawyers who are reading this interview, who go to ESI sessions, who follow the legal developments, don't find themselves in a position of potentially violating 26(g). It is an excellent tool for the court to try and raise the bar for those who are otherwise a little lazy in dealing with their discovery obligations.

Hauswirth: A recent case, *Rodman v. Safeway*, is instructive in the use of 26(g) as a basis for sanctions. Safeway had to pay $688,000 in sanctions for failing to make a reasonable inquiry for information related to contract terms in a breach-of-contract class action alleging it charged higher prices to customers using its online delivery service than in its physical stores. Discovery was narrowed to what Safeway's terms and conditions were with those customers during a specific time period. After representing that it did not locate any responsive documents from the time period, Safeway produced 10 highly relevant documents seven days before trial from the computer of one of its marketing directors – material squarely in the scope of discovery. The court found that Safeway's search was unreasonable for three reasons: 1) failure by Safeway and its counsel to guide or monitor the custodian's search; 2) relying on that search; and 3) that the search itself was objectively unreasonable because the custodian only searched file folders and not the documents within the folders, even though the file folder titles contained responsive terms. The court found the search was an unreasonable inquiry under Rule 26(g) with no substantial justification and sanctioned Safeway. The takeaways are the importance of making sure that representations made to the court are accurate, and monitoring discovery rather than relying on untested assertions.

MCC: One of the hopes for the amended rules was that they would spur greater cooperation among parties and their lawyers. There was, of course, also a certain amount of skepticism. Judge* Dembin*, when it comes to cooperation what are you seeing and what do you expect?

Dembin: The good lawyers have been cooperating with each other and are continuing to cooperate. Ruth and I are fortunate to practice in the Southern District of California. We have a bar that is generally very cooperative, and our court is actively involved in case management, including discovery. You don't see a lot of the highly contentious discovery battles that some of my colleagues see in other places. I think portions of the rules were designed to address other parts of the country where the culture of case management wasn't as intense as it is here. We're regularly in contact with the litigants, and we see a lot of cooperation.

MCC: Jennifer, please give us the consultant's perspective on that.

Brennan: I see both extremes and everything in between. For whatever reason, some parties do not or cannot avail themselves of the meet and confer process or reach agreement on issues such

as search terms and ESI protocols. For example, one matter involved search terms that returned 90 percent of the collected documents and the parties were unable to engage in meaningful discussions to narrow the terms. There is also the other extreme. Folks within the e-discovery bubble have been conferring for years on preservation, proportionality, search term protocols and the like. Unfortunately that remains an insular group of attorneys. The feedback I hear from clients that fall in the middle generally concern questions about where cooperation starts and stops. What does it mean to cooperate? How much of your affirmative case or defense do you need to reveal during the meet and confer process? Distrust often results in a reluctance to engage in a cooperative process.

One case, *Pyle v. Selective Ins.*, in the Western District of Pennsylvania offers an interesting perspective. After Plaintiff refused several requests from Defendant to provide search terms that Defendant's should use to search its large email archives, Defendant filed a motion to compel Plaintiff to respond. Plaintiff objected that Defendant had cited no authority to support its request nor identified any burden that it faced to locate and produce the requested emails. The court found Defendant's motion to be consistent with both the letter and the spirit of the federal and local rules and ordered Plaintiff to confer *and agree* on search terms. It will be interesting to see if the parties will be able to reach agreement or if further motions practice is required to resolve differences.

Dembin: It's another one of those rat holes that the court would like to avoid – what the search terms may be, or the type of technology that may or may not be used. My view of discovery is still a traditional view. E-discovery and ESI have brought special considerations into play, but the reality is that discovery is still discovery. The requesting party makes their requests. The producing party has to consider them, object where appropriate, and otherwise find, collect and produce non-privileged, relevant information. That's the game of discovery. The fact that it's getting more and more expensive because of digitally stored information does create special considerations, and the court needs to be a little more involved in that regard. Nonetheless, the fundamental roles of the requesting party and the producing party haven't changed, even under the amendments, or because we now have huge amounts of stored data.

MCC: You don't see the court's role having changed as far as things like the selection of technology in discovery?

Dembin: No. The rules provide that the court should be more involved in this process, and I don't disagree with the parties and the judge having discussions and perhaps getting some guidance. The judge sees a lot more cases than some of the lawyers do and knows how other cases have proceeded – what's worked and what hasn't. But I don't think it's the judge's job to tell one party or another how to comply with their discovery obligations. They have to do what they think is the right thing, and if they fail unreasonably, there's a price to pay.

Hauswirth:. A recent case from the Southern District of New York, *Hyles v. New York City*, speaks directly to that point. In *Hyles,* the court denied Plaintiff's motion to compel Defendant to use technology assisted review citing Sedona Principle 6, which states that "[r]esponding parties are best situated to evaluate the procedures, methodologies and technologies for preserving and producing their own electronically stored information." The court said it cannot force a party to use technology assisted review, and Defendant can "use the search method of its choice." It further explained that Plaintiff can take issue with the results if there are deficiencies.

MCC: There is a lot of movement among bar associations to enshrine a lawyer's duty of technological competence. Judge Dembin, will this have a positive impact?

Dembin: Absolutely. Not just the duty of technological competence, but also the duty to supervise vendors and the process of collecting discovery. It circles backs to the discussion we had earlier about Rule 26(g). If you're a lawyer and you're going to sign a discovery response, you're saying that some element of production is accurate to the best of your knowledge, information or belief after reasonable inquiry. If you are technically incompetent, how could you have knowledge, information or reasonable belief? You're simply a duck signing a piece of paper. For me, the push toward more technical competence, or recognition that certain lawyers do not have it and must associate with someone who does, is hugely important. It's a boon for the court and for litigation in general.