REDGRAVE LLP

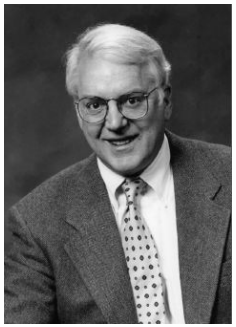
The Redgrave Roundtable

New Proposed Federal Discovery Rules: What They Say & What Is Next

INFORMATION **MATTERS** | MINNEAPOLIS | SAN FRANCISCO | WASHINGTON DC

Today's Speakers

- Jonathan Redgrave Partner, Redgrave LLP



- Thomas Allman Adjunct Professor, University of Cincinnati College of Law, former Senior Vice President and General Counsel, BASF Corporation

We've Been Down This Road Before

Accomplishments and Shortcomings of the 2006 Amendments

Accomplishments Of The 2006 Amendments Added ESI And eDiscovery Issues To The Discovery Highway

- Formally identified ESI as discoverable. (Rules 26(a)(1)(A)(ii), 33(d) and 34(a)(1)(A))
- Compelled early attention to eDiscovery issues in Rule 26(a)(1)(A)(ii) disclosures and 26(f) conferences; added ESI issues as an item for Rule 16 scheduling orders.
- Recognized need to address preservation issues in Rule 26(f) conferences.
- Addressed format of production issues. (Rule 34(b)(2)(E))
- Created a category of ESI that is "not reasonably accessible" to limit the potential burdens associated with producing ESI. (Rule 26(b)(2)(B))
- Created a procedure to permit a party that inadvertently produced privileged material to assert a protective claim to that material. (Rule 26(b)(5)(B))
- Created a "safe harbor" for data lost as a result of the routine, good-faith operation of an electronic information system. (Rule 37(e))

The Potholes in the 2006 Amendments

- "Safe harbor" - neither safe nor a harbor
- "Not reasonably accessible" language does not appear to have had an appreciable positive impact on discovery practice
- Courts reluctant to call upon proportionality principles to limit discovery
- Courts generally refuse to share or shift discovery costs
- The cost, risk, and frustration associated with electronic discovery continues to increase

The 2013 Proposals

The 2013 Proposals

The Advisory Committee on Civil Rules described its focus on three areas:

1. **Proportionality** in discovery;
2. **Cooperation** among lawyers; and
3. **Early and active judicial case management**

The core theme that animates the 2013 proposals is the need to **reduce the burdens of modern discovery**.

Spoiler Alert: The most important proposed changes are in 26(b)(1)(scope of discovery and proportionality) and 37(e) (standard for sanctions); slide sections marked with **

Reducing the Burdens of Modern Discovery
More Cooperative: Rule 1

- What changed?
  - Federal Rules have never mentioned "cooperation"
  - The proposed committee note states that "effective advocacy is consistent with – and indeed dependent on – cooperative and proportional use of procedure"

- Rationale for the change
  - Stems from recognition that "zealous advocacy" in discovery is often at odds with the "just, speedy, and inexpensive determination" of legal matters

Reducing the Burdens of Modern Discovery
More Cooperative: Rule 1

- Will it work?
  - Encouraging cooperation may have a salutary impact
    - Most discovery skirmishes do little to improve the evidentiary record but are seen as wasting a lot of client time and money
    - If the parties cooperate, discovery might become more focused, efficient and less expensive

- But…
  - "Cooperation" is an elusive concept and the comment may create situations where protecting privileged and confidential information is seen as "non-cooperative" with adverse affects
  - The proposal has no mandatory teeth, meaning that any impact by courts will likely be idiosyncratic

Reducing the Burdens of Modern Discovery Faster: Rules 4(m), 16(b)(2), and 26(d)(1)

- What changed?
  - Service of Summons: 120 days → 60 days
  - Scheduling Order: 90 days → 60 days
    - Moves the 26(f) conference up 30 days
    - Moves 26(a)(1)(B) disclosures up 30 days
  - Document Requests: post-26(f) → pre-26(f)

- Rationale for the changes: promote "early case management"

Reducing the Burdens of Modern Discovery Faster: Rules 4(m), 16(b)(2), and 26(d)(1)

- Will they work?

  Accelerated timetable will compel parties to more aggressively manage their cases at the beginning

- **But…** faster can also be more expensive and less focused
  - Greater onus on entities with large volumes of data
  - Without limitations on scope, can lead to broader discovery
  - May hinder investigations and lead to inaccurate representations and commitments at Rule 26(f) conferences spawning more discovery and litigation about discovery
  - May propel parties into discovery when early case assessment might have produced an early resolution

Reducing the Burdens of Modern Discovery
Cost-Shifting: Rule 26(c)

- What changed?

  The proposed amendment permits a court, for good cause, to protect a party from undue burden or expense by an "allocation of expenses" of disclosure and discovery

- Rationale for the change

  Forestall litigants from challenging courts' authority to put cost-shifting provisions into a protective order

Reducing the Burdens of Modern Discovery
Cost-Shifting: Rule 26(c)

- Will it work?

  The rule may embolden courts to engage in more cost-shifting for discovery expenses

- **But…** this rule is no real change
  - Courts already have authority to cost-shift so the impact may be modest
  - Relatively weak language and the discretion for courts remains broad, meaning that the availability of cost-shifting and cost-sharing is likely to remain idiosyncratic

Reducing the Burdens of Modern Discovery Smaller: Rules 30, 31, 33, and 36

- What changed?
  - Depositions: 10 → 5 | 7 hrs → 6 hrs
  - Written depositions: 10 → 5
  - Interrogatories: 25 → 15
  - Requests to admit: ∞ → 25

- Rationale for the changes

  Decrease civil litigation costs and make the system more accessible to average citizens

Reducing the Burdens of Modern Discovery
Smaller: Rules 30, 31, 33, and 36

- Will they work?

  Reducing the presumptive number of depositions, interrogatories and requests to admit should reduce the volume of legal work associated with civil litigation resulting in fewer burdens on litigants

- **But**… changes may be more about form than substance
  - Limits can (and will) be modified on motion to the court meaning that the limits might be illusory
  - Could be an increase in motions arguing for increased discovery, increasing the costs

Reducing the Burdens of Modern Discovery
Proportional: Rule 26(b)(1)

- What changed?

  Limits the general scope of discovery in Rule 26(b)(1) to what is "proportional to the needs of the case" according to the factors that are presently in Rule 26(b)(2)(c)(iii)

- Rationale for the change

  Discovery continues to run out of proportion in a worrisome number of cases – especially large, complex ones

Reducing the Burdens of Modern Discovery
Proportional: Rule 26(b)(1)

- Will it work?

  Proposal requires that proportionality be accounted for when defining the scope of discovery and may embolden courts to be more aggressive in deciding what really matters to the parties' claims and defenses – and hence limit discovery

- **But**…will yet more changes to the rules language change a culture?
  - Why do we think moving the proportionality standard in Rule 26(b)(2)(c)(iii) to Rule 26(b)(1) will make courts address proportionality arguments differently?
  - Concepts of proportional discovery have been overlooked in the past; it is unclear what impact the new 26(b)(1) language might have on the value of the (c)(i) and (c)(ii) limitations
  - Without meaningful ways and means to enforce a uniform application of proportionality by parties and courts, there is reasonable apprehension about the success of these amendments
  - The new proposal only addresses proportional preservation in an oblique fashion and it is unclear if that will clear the way for courts to openly endorse the concept

Reducing the Burdens of Modern Discovery Focused: Rule 26(b)(1)**

- What changed?
  - Focuses all discovery on the claims and defenses of the parties and not general subject matter
  - Eliminates the language that allowed for discovery of information "reasonably calculated to lead to the discovery of admissible evidence"

- Rationale for the changes
  - "Reasonably calculated" language was generally seen as having removed all limits on the scope of discovery
  - Without changes to 26(b)(1) that focused the scope of discovery, the new proportionality language in 26(b)(1) limiting discovery "to the needs of the case" would be swallowed up by language permitting broad discovery

Reducing the Burdens of Modern Discovery Focused: Rule 26(b)(1)**

- Will it work?
  - Language limits discovery to "matter that is relevant to any party's claim or defense" – strong tool to curb scope
  - The "reasonably calculated" language was often used by litigants to subvert the scope of discovery limitations of Rule 26(b)(1); its removal should lessen mischief

- **But**…will the changes be heard and heeded?
  - A substantial number of cases speak about "broad discovery" and some question whether courts will lean on existing precedent to allow the same level of discovery
  - The significance of the language changes will need to be matched by education and commentary for courts to understand and enforce new limits

Reducing the Burdens of Modern Discovery
Proportionality & Preservation: Rules 16(b), 26(f) and 37(e)(2)

- With the advent of electronic information, preservation disputes are now at the heart of many spoliation motions
  - Was the legal hold put in place at the right time?
  - Were all the custodians identified?
  - Were reasonable efforts taken to preserve the data?

- Yet preservation has traditionally been considered outside the scope of the Federal Rules in light of the common law heritage and limits imposed by the Rules Enabling Act, leaving it to the common law to define the scope of the duty to preserve

- The remains an acute need for the rules and/or courts to articulate clear proportionality standards for preservation so that parties will not have to resort to over-preserving to avoid sanctions

Reducing the Burdens of Modern Discovery
Proportionality & Preservation: Rules 16(b), 26(f) and 37(e)(2)

- What changed?
  - Preservation is now specifically included in a list of topics for Rule 16(b) Scheduling Orders
  - Preservation has moved from being a suggested topic at the Rule 26(f) conference to a required part of the parties' Discovery Plans
  - Rule 37(e)(2) identifies five factors to be considered when determining sanctions for failure to preserve

- Rationale for the changes

  Simply untenable for the Federal Rules to no longer address a principal area of conflict in discovery

Reducing the Burdens of Modern Discovery
Proportionality & Preservation: Rules 16(b), 26(f) and 37(e)(2)

- Will they work?
  - Addressing preservation issues early in the litigation should defuse many potential preservation disputes
  - The five Rule 37(e)(2) factors provide some guidance on the standards for preservation, accept the premise that proportionality applies to preservation, and offer a type of "safe harbor" for litigants who seek input from the courts

- **But…**
  - There's always the possibility that shining more light on preservation practices will encourage, rather than defuse, disputes
  - The Rule 37(e)(2) factors do little to define clear preservation standards for legal hold triggers, reasonableness of efforts, and proportionality

Reducing the Burdens of Modern Discovery
Limiting Sanctions for Spoliation of Discoverable Information: Rule 37(e)**

- The 2006 Amendment to Rule 37(e) was very limited in scope – it simply created a "safe harbor" for ESI destroyed pursuant to the routine, good-faith operation of a document retention system
  - Application of Rule 37(e) was uneven
  - Parties continued to over-preserve out of fear

- The 2013 proposals scrap the 2006 version of Rule 37(e) in favor of a uniform national culpability standard for spoliation sanctions that applies to all discoverable information, not just ESI

Reducing the Burdens of Modern Discovery
Limiting Sanctions for Spoliation of Discoverable Information: Rule 37(e)**

- What changed?

  Three tiers of sanctions

	Sanctionable Conduct	Sanction
1	Failure to preserve	Curative measures
2	Failure to preserve + substantial prejudice + willful or bad faith	Rule 37(b)(2)(A) sanctions – including adverse inference instruction and default
3	Failure to preserve + irreparable deprivation of opportunity to present or defend against a claim	Rule 37(b)(2)(A) sanctions – including adverse inference instruction and default

- Rationales for the changes
  - Need for uniform spoliation standards
  - Need to create a limitation on case-altering sanctions for non-prejudicial/non-willful spoliation of information

Reducing the Burdens of Modern Discovery
Limiting Sanctions for Spoliation of Discoverable Information: Rule 37(e)**

- Will they work?
  - There should be fewer instances where case-altering sanctions will be imposed/upheld
  - The "curative measures" punishment for non-prejudicial/non-willful losses of information may help limit the distortions in the case law created when judges stretched concepts of willfulness and faith in order to impose any sanctions under the prior Rule 37
- **But…**
  - The "irreparable deprivation" standard of Rule 37(e) could become a Trojan Horse that swallows the rule, since parties will likely argue that any losses of information have resulted in irreparable deprivation in order to get around the *mens rea* requirements for Rule 37(e)(2)(A) sanctions.
  - The "curative measures" as described in the Advisory Committee note are broad, and even include allowing parties to argue spoliation to the jury (sans adverse inference instruction from court)
  - Willfulness and bad faith still remain elastic concepts that can be stretched by courts to fit circumstances to justify results.

What is Next?
What Can You Do?

- Provide comments: Rules will be published for public comment this Fall: Six-month public comment period will begin August 15th and conclude on February 15, 2014.

- Attend hearings: Period will likely include three public hearings:
  - November 7, 2013 in Washington, D.C.;
  - January 9, 2014 in Phoenix, Arizona; and
  - Early February 2014 in Dallas, Texas

- Written submissions will be accepted throughout the comment period; numerous individual and group submissions are expected

- Consider whether your organization wants to have a voice – either individually or by joining a group commentary and/or testimony

Resources

- Handouts available at www.redgravellp.com
  - T. Allman, Rule Committee Adopts 'Package' of Discovery Amendments (Bloomberg DDEE April 25, 2013)
  - May 8, 2013 Report of the Advisory Committee on Civil Rules