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### Bloomberg Law Insight

Gibson Dunn partner Gareth T. Evans examines the major eDiscovery opinions of 2016 and concludes the troubling issues remain sanctions, scope of discovery, technology assisted review, cooperation and cost shifting.

## Wrapping Up 2016: Major Trends, New Rules and Emerging Caselaw



BY GARETH T. EVANS

**H**aving just closed out another year, now is an opportune time to look back at the significant judicial decisions regarding eDiscovery in 2016.

The most prominent decisions involved sanctions and the scope of discovery under recently amended Federal Rules of Civil Procedure 37(e) and 26(b)(1), respectively. There were also several significant decisions regarding the use of technology assisted review (*i.e.*, “TAR” or predictive coding)—in particular, whether its use can be compelled and a post-production challenge to its sufficiency. Additionally, there were noteworthy decisions about cooperation and cost shifting in eDiscovery.

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### Rule 37(e) and Sanctions

Amended Rule 37(e), which became effective December 1, 2015, appears to be having a substantial impact in the sanctions area. Key provisions of amended Rule 37(e)—*i.e.*, the requirement of an intent to deprive for the most serious sanctions under Rule 37(e)(2), the Rule’s application only to electronically-stored information (“ESI”), the requirements of an actual loss of ESI and its unavailability from other sources, and the requirement of prejudice to the moving party—played out in a number of cases during the year.

Several cases involved sanctions either being denied or limited pursuant to the provisions of the amended rule. The decision in *NuVasive Inc. v. Madsen Medical Inc.*, 2016 BL 20440 (S.D. Cal. Jan. 26, 2016), is perhaps the most powerful example of the amended rule’s impact. Before the amendment became effective, the court in *NuVasive* had granted the sanction of an adverse inference jury instruction because the plaintiff had failed to preserve discoverable text messages. The court imposed the sanction even though it found that the plaintiff had not acted with the intent to deprive the defendant of the text messages.

After the amended rule became effective, the plaintiff in *NuVasive* moved to vacate the previous order. The court granted the motion, holding that an adverse inference instruction is not permitted under the amended rule unless the party acted with the intent to deprive.

**True Loss and Prejudice Required.** *Living Color Enterprises, Inc. v. New Era Aquaculture, Ltd.*, 2016 BL 92475 (S.D. Fla. Mar. 22, 2016), is another example of amended Rule 37(e) being applied to deny sanctions despite a failure to preserve. In *Living Color*, the plaintiff

sought case terminating sanctions or, alternatively, an adverse inference jury instruction, against an individual defendant who failed to preserve discoverable text messages on his cell phone. The defendant contended that he always used the cell phone feature that automatically deletes text messages after 30 days and that he had neglected to disable the feature when the lawsuit was filed.

The court found, however, that the vast majority of the defendant's text messages were produced from other sources and those that remained lost were unimportant. Having found no loss of important text messages, and therefore no prejudice to the plaintiff, the court denied sanctions under Rule 37(e).

Similarly, in *FiTeq Inc. v. Venture Corp.*, 2016 BL 144929 (N.D. Cal. Apr. 28, 2016), the court denied the plaintiff's motion for an adverse inference jury instruction under amended Rule 37(e) because e-mails deleted by the defendant's executive vice president were recovered from his old computer and also obtained and produced from the e-mail accounts of others.

The court relied on amended Rule 37(e)'s provisions that sanctions can only be imposed where the ESI "cannot be restored or replaced through additional discovery" and where there has been a "finding [of] prejudice to another party from the loss of the information."

In *Mathew Enterprise Inc. v. Chrysler Group LLC*, No. 5:13-cv-04236 (N.D. Cal. May 23, 2016), the plaintiff failed to preserve e-mails and customer communications after its duty to preserve was triggered when it threatened litigation in a letter to the defendant.

In particular, the plaintiff allowed all of the e-mail communications on its e-mail system to be deleted when it changed e-mail vendors, and it failed to notify its customer communications vendor to suspend its auto-delete function. The court found that the plaintiff failed to take reasonable steps to preserve discoverable information, and that the defendant was prejudiced as a result. It granted curative measures: for example, that the defendant could present evidence and argument regarding the spoliation.

But the court denied the requested sanction of evidence preclusion because it "would effectively decide the case," finding that absent an intent to deprive this would be an excessive and inappropriate remedy.

**Rule Applies to ESI Only.** In *Best Payphones, Inc. v. New York*, 2016 BL 61617 (E.D.N.Y. Feb. 26, 2016), defendants argued that the plaintiff failed to preserve both hard copy documents and ESI. Because amended Rule 37(e) only applies to ESI, the court applied the Second Circuit's existing sanctions standards to the lost hard copy documents and Rule 37(e) to the lost ESI. Although the court found that the plaintiff had been negligent in its failure to properly implement a legal hold, and that the lost information was relevant, it nevertheless declined to impose sanctions because defendants did not demonstrate that they suffered prejudice from the loss of the information.

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**... even under Rule 37(e)(2) "the remedy should fit the wrong" and the most severe measures that it authorizes should not be used when lesser measures would redress the loss.**

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**Punishment Must Fit the Wrongdoing.** *BMG Rights Mgt. LLC v. Cox Comm., Inc.*, 2016 ILRC 2427 (E.D. Va. Aug. 8, 2016), illustrates how Rule 37(e) can be applied to limit sanctions even where a party acted with the intent to deprive. The magistrate judge found that the plaintiff intentionally destroyed material information that it had a duty to preserve by altering, deleting and overwriting relevant source code. The district judge gave a permissive adverse inference instruction regarding plaintiff's destruction of ESI to the jury at trial, and the jury nevertheless returned a \$25 million verdict. The defendant moved for a new trial arguing, among other things, that the court should have imposed a stronger sanction, such as evidence preclusion or dismissal. The court rejected this argument, reasoning that even under Rule 37(e)(2) "the remedy should fit the wrong" and the most severe measures that it authorizes should not be used when lesser measures would redress the loss.

Similarly, in *First Fin. Sec., Inc. v. Freedom Equity Group, LLC*, 2016 BL 337069 (N.D. Cal. Oct. 7, 2016), the court awarded a permissive adverse inference jury instruction for the deletion of discoverable text messages, but declined to impose a more severe sanction. The court reasoned that "the remedy should fit the wrong" and that because there was some question about the extent to which the plaintiff was prejudiced, a permissive adverse inference instruction would fairly redress the loss.

**Intent to Deprive Draws Serious Sanctions.** In several cases, however, courts found that the most serious sanctions were warranted under Rule 37(e)(2) where there was an intent to deprive. In *Brown Jordan International, Inc. v. Carmicle*, 2016 BL 63058 (S.D. Fla. Mar. 2, 2016), the court found that the defendant—among other things—remotely wiped his company-owned iPad and locked his company-owned laptop computer, refusing to unlock it even up until trial. He also failed to preserve relevant data on his personal iPad, his personal laptop computer, his personal iPhone and on his wife's laptop computer. Pursuant to amended Rule 37(e), the court allowed adverse evidentiary inferences to be made regarding the lost ESI, but declined to grant case terminating sanctions.

In *GN Netcom, Inc. v. Plantronics, Inc.*, 2016 BL 230622 (D. Del. July 12, 2016), the court found that a senior executive intentionally deleted thousands of e-mails for the purpose of making them undiscoverable in the litigation, and that he ordered others to do so as well. Although the company had taken a number of steps to preserve documents—including distributing quarterly legal hold notices and conducting training sessions to ensure compliance—the court held that, because of the executive's intentional spoliation, the com-

pany could not be deemed to have acted “reasonably” in preserving documents.

The court agreed with the plaintiff that the company’s “reliance on these actions to excuse the intentional, destructive behavior of Mr. Houston requires a ‘perverse interpretation’ of Rule 37(e), one which would set a dangerous precedent for future spoliators.” The court ordered an array of sanctions against the company under Rule 37(e)(2), including an adverse inference jury instruction, monetary sanctions in the form of reasonable fees and costs to the plaintiff, a “punitive” sanction of \$3 million, and possible evidentiary sanctions to be determined before trial.

In *InternMatch, Inc. v. Nxtbigthing, LLC*, 2016 BL 36242 (N.D. Cal. Feb. 8, 2016), the court found that the defendant falsely claimed that a power surge had destroyed computers containing relevant evidence and that the company failed to make any effort to determine if ESI was salvageable from the computers before discarding them. Additionally, eight days before the claimed power surge, the company’s owner had called its insurer to find out how a power surge would affect an insurance payout. Pursuant to amended Rule 37(e), the court granted an evidence preclusion order, an adverse inference instruction, and attorneys’ fees, but declined to impose case terminating sanctions.

In *O’Berry v. Turner*, 2016 BL 133164 (M.D. Ga. Apr. 27, 2016), which involved an accident between a big-rig truck and a car, the court found that the defendant’s preservation failures constituted an intent to deprive the plaintiff of relevant ESI in the litigation. Although the plaintiff sent a preservation letter, and the defendant sent a response that acknowledged receipt and stated that it would take the necessary measures to preserve evidence, the defendant failed to preserve relevant ESI (in this case, an electronic driver’s log and data from an application that recorded information about the truck).

Rather, the defendant printed out a single, hard copy of the data, which it subsequently could not locate. The court found that, in failing to take reasonable steps to preserve ESI, the defendant acted with the intent to deprive the plaintiff of its use in the litigation, and ordered an adverse inference jury instruction.

Finally, in a decision in Delaware Chancery Court—thus not falling under Rule 37(e)—that garnered a lot of attention, the court sanctioned an executive and co-founder of an eDiscovery vendor \$7.1 million for having intentionally destroyed evidence from his laptop after he was ordered to submit it during discovery. See *In re Shawe & Elting LLC*, 2016 BL 232452 (Del. Ch. Jul. 20, 2016). The sanctioned party has appealed the decision.

## Amended Rule 26(b)(1) and Proportionality

Another significant development arising out of the December 1, 2015 FRCP amendments is how much traction proportionality as a limit on the scope of discovery appears to have gained with courts. Amended Rule 26(b)(1) incorporates in the scope of discovery an explicit requirement that discovery must be “proportional to the needs of the case” and sets forth factors that the court should consider in determining proportionality.

In *In re Bard IVC Filters Prod. Liab. Litig.*, 2016 BL 306366 (D. Ariz. Sept. 16, 2016), the plaintiffs sought all communications of all 18 of the defendant’s foreign

subsidiaries with foreign regulators, over a 13-year period, regarding the filters at issue.

The defendant submitted evidence that its United States operations handled most communications with regulators, including foreign regulators, and substantial discovery in the United States was already ongoing regarding such communications. The court found that the relevance of communications between the defendant’s foreign subsidiaries and foreign regulators was speculative (“more hope than likelihood”) and the burden and expense of the discovery would be “substantial.”

Accordingly, it held that the proposed discovery was not proportional to the needs of the case, as required under amended Rule 26(b)(1).

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**“ . . . 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.”**

*GILEAD SCIENCES v. MERCK*  
2016 BL 12304 (N.D. CAL. JAN. 13, 2016)

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Similarly, in *Noble Roman’s, Inc. v. Hattenhauer Distributing Company*, 314 F.R.D. 304 (S.D. Ind. 2016), the defendant served document and deposition subpoenas upon a “major shareholder” of the plaintiff, seeking production of 23 “wide-ranging” categories of documents, essentially asking for “every document and every piece of information it has . . . about every aspect of [Plaintiff’s] business operations, finances, marketing plans, and management structure.” The plaintiff asserted that the discovery was an “improper fishing expedition” and “outside the proper bounds of discovery.”

**Revising a Familiar Standard.** The court invoked the proportionality requirement of amended Rule 26(b)(1) and stated that the defendant “beats the drum of ‘relevancy’ ” but “never attempts to demonstrate that the discovery is in any way proportional to the needs of the case, considering such things as the amount in controversy, the importance of the information in resolving contested issues, whether the burden of the discovery outweighs its likely benefits, whether the information can be obtained from other and more convenient sources, or whether the information is cumulative to other discovery[.]” The court stated “[t]hat’s not good enough.”

The court observed that while the proportionality amendment to Rule 26(b)(1) was a “structural and linguistic alteration” of the already-existing proportionality provision in Rule 26, it was “designed to protect against over-discovery and to emphasize judicial management of the discovery process.” The court held that, in this case, the broad document and deposition subpoenas constituted “discovery run amok” and that they “fail[ed] the proportionality test” of amended Rule 26(b)(1).

*Gilead Sciences v. Merck*, 2016 BL 12304 (N.D. Cal. Jan. 13, 2016), is another case in which the court invoked the proportionality requirement of amended Rule

26(b)(1) in limiting discovery. In finding certain document requests were disproportionate to the needs of the case, the Court stated that under the amended rule “[n]o 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. Instead, 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.”

**Stay Current!** Finally, at least one court’s holding has demonstrated that it can be perilous for attorneys to rely upon cases involving standards regarding the scope of discovery that are now outdated following the 2015 amendment to Rule 26(b)(1). In *Fulton v. Livingston Fin., LLC*, 2016 BL 238466 (W.D. Wash. Jul. 25, 2016), the court stated that an attorney’s reliance on pre-amendment case law applying outdated standards regarding the scope of discovery was “inexplicable” and “inexcusable” because the amendment to Rule 26(b)(1) “dramatically changed” what information is discoverable. The court imposed monetary sanctions and ordered the attorney to provide the “offending brief” to “senior members” of his firm with the explanation that “the court is entering sanctions . . . for quoting provisions of the civil rules that are badly out of date, and also [for] making direct misrepresentations to the court.”

## Technology Assisted Review

The year was relatively quiet with respect to cases dealing with technology assisted review (“TAR” aka predictive coding). In two cases, the courts rejected the requesting party’s motion to compel the responding party to use TAR. And in one case, the court rejected a post-production challenge to the responding party’s use of TAR.

In *Hyles v. New York*, 2016 BL 248010 (S.D.N.Y. Aug. 1, 2016), the court concluded that defendant New York City could not be required to use TAR, at least in the first instance, against its wishes. The court agreed with the plaintiff that, “in general, TAR is cheaper, more efficient and superior to keyword searching.”

Nevertheless, the court cited Sedona Principle 6, which provides that “[r]esponding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information.”

The court suggested, however, that the answer could be different if the TAR-based production were later found to be deficient. The court concluded that while the plaintiff “may well be correct that production using keywords may not be as complete as it would if TAR were used, the standard is not perfection, or using the ‘best’ tool, but whether the search results are reasonable and proportional.”

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**“[r]esponding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information.”**

*THE SEDONA CONFERENCE PRINCIPLE 6*

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Similarly, in *In re Viagra (Sildenafil Citrate) Prod. Liab. Litig.*, 2016 BL 347130 Case No. 16-md-02691-RS (SK), slip. op. at 1-3 (N.D. Cal. Oct. 14, 2016), the court denied the requesting party’s motion to require that the responding party use TAR. The responding party instead planned to employ an iterative search-term process, which it would test and validate through sampling.

Relying upon the reasoning of *Hyles*, the court held that it was not up to the court or the requesting party to force the responding party to use TAR when it preferred to use search terms. The court concluded that

“even if predictive coding were a more efficient and better method, which [the responding party] disputes, it is not clear on what basis the Court could compel [the responding party] to use a particular [search method], especially in the absence of any evidence that [the responding party’s] preferred method would produce, or has produced, insufficient discovery responses.”

The court therefore denied the motion, without prejudice to revisiting the issue if the requesting party later contended that the production was deficient.

**Post-Production Challenge.** In *Dynamo Holdings Lt. P’ship v. Comm’r of Internal Revenue*, No. 2685-11 (T.C. Jul. 7, 2016) (“*Dynamo Holdings II*”), the tax court addressed a post-production challenge to the sufficiency of a TAR process.

The court had previously authorized the petitioners’ use of TAR over the objection of respondent Commissioner of Internal Revenue. The parties then agreed to a TAR protocol in which the requesting party—i.e., the Commissioner—trained the TAR tool.

Nevertheless, the Commissioner was dissatisfied with the results. The Commissioner therefore sought to have the court order the responding party to start over with a manual review. The court denied the motion, holding that the responding party made a “reasonable inquiry” in using TAR and producing documents “that the algorithm determined was responsive[.]”

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**Two TAR myths: The myth of human review and the myth of a perfect response.**

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In particular, the court reasoned that the respondent’s motion was “predicated on two myths.” The first, according to the court, is the “myth of human review,” i.e., “that manual review by humans of large amounts of information is as accurate and complete as possible—perhaps even perfect—and constitutes the gold standard by which all searches should be measured.” Citing

studies, the court stated that “research shows that human review is far from perfect.”

The second myth, according to the court, “is the myth of a perfect response.” The court stated that the respondent was “seeking a perfect response, but our Rules do not require a perfect response.”

Specifically, in response to discovery requests, Tax Court Rule 70(f), which is analogous to Federal Rule of Civil Procedure 26(g), “requires the attorney to certify, to the best of their knowledge formed after a ‘reasonable inquiry,’ that the response is consistent with our Rules, not made for an improper purpose, and not unreasonable or unduly burdensome given the needs of the case.”

The court stated that “when the responding party is signing the response to a discovery demand, he is not certifying that he turned over everything, he is certifying that he made a reasonable inquiry and to the best of his knowledge, his response is complete.”

The court concluded that “it is inappropriate to hold TAR to a higher standard than keywords or manual review.” It held that “there is no question” that the responding party satisfied its production obligations in using TAR.

### Cooperation

*Pyle v. Selective Ins. Co. of Am.*, 2016 BL 325531 (W.D. Pa. Sept. 30, 2016), addressed cooperation in the eDiscovery process. The requesting party refused to discuss with the responding party search terms to locate documents responsive to its document requests. The court stated that the requesting party’s refusal to discuss search terms “borders on the incomprehensible.”

“Among the items about which the court expects counsel to reach practical agreement without the court

having to micro-manage eDiscovery are search terms, date ranges, key players and the like.”

The court therefore issued an order compelling the requesting party to confer and reach an agreement on search terms.

### Cost Shifting

Finally, at least one court ordered cost shifting as a condition for permitting burdensome discovery of inaccessible data. In *Elkharwily v. Franciscan Health Sys.*, 2016 BL 246591 (W.D. Wash. Jul. 29, 2016), the court ruled under Federal Rule of Civil Procedure 26(b)(2)(B) that the plaintiff could only require the defendant to search monthly disaster recovery backup tapes for responsive e-mails if the plaintiff paid the costs of doing so. Those costs were substantial, as the defendant presented evidence that to retrieve, restore and review each backup tape would require 1,400 hours of labor and \$157,000 in costs.

A significant factor in the court’s decision was its finding that although the e-mails on backup tapes were discoverable under Rule 26(b)(1), there was not “good cause” to compel their production without cost shifting pursuant to Rule 26(b)(2)(B) because the plaintiff had failed to present evidence that any responsive emails actually existed on the backup tapes.

### Conclusion

Most noteworthy among the eDiscovery cases in the past year were those applying recently amended Rule 37(e) in the spoliation sanctions context and the proportionality requirement under amended Rule 26(b)(1) in the scope of discovery context. The year was relatively quiet with respect to decisions involving TAR, and there were at least a couple of significant decisions regarding cooperation and cost shifting in eDiscovery.