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PROPOSED FED.R.CIV.P. 37

The author offers some tentative observations on the process the courts might adopt to determine the reasonableness of preservation efforts under Proposed Federal Rule of Civil Procedure 37.

'Reasonable Steps': A New Role for a Familiar Concept

By Tom Allman[1]

Introduction

After dissatisfaction surfaced with the original proposal to replace Rule 37(e), a revised proposal was submitted to and approved by the Rules Committee at its April 11, 2014 Meeting.[2]

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In an unexpected change made immediately prior to the vote,[3] the Committee clarified that only when a loss of electronically stored information (ESI) is caused by a failure to take ''reasonable steps'' which cannot be remedied by additional discovery are the measures in subdivision (e)(1) or (e)(2) available to a court.

More specifically,

> ''[Rule 37](e) Failure to ~~Provide~~ Preserve Electronically Stored Information. *If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court: [may undertake the listed actions in Subsections (1) or (2)]*[4]

During the ensuing discussion, the Chair of the Discovery Subcommittee stated that the last-minute change was ''meant to encourage reasonable preserva-

[1] ©Thomas Allman.

[2] The text and Committee Note to Rule 37(e) are at B-56 through B-67 of the June 2014 Committee Report, copy at http://www.law.georgetown.edu/cle/materials/eDiscovery/2014/thurs325docs/JudicialConferenceMemorandum.pdf and on the Bloomberg BNA eDiscovery Resource Center.

[3] ''Advisory Committee Makes Unexpected Changes to 37(e) ,'' 14 DDEE 196, April 14, 2014, copy at http://www.bna.com/advisory-committee-makes-n17179889550/.

[4] ''(1)*upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may: (A) presume that the lost information was unfavorable to the party; (B) instruct the jury that it may or must presume the information was unfavorable to the party; or (C) dismiss the action or enter a default judgment.''*

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tion behavior,'' tempered by proportionality concerns[5] and that ''reasonable steps'' embraces a culpability factor.[6]

In doing so, it also serves as a *de facto* ''safe harbor'' despite imperfections in executing preservation obligations.[7]

In assessing whether conduct constitutes ''reasonable steps'' under the Proposed Rule, courts will necessarily weigh the challenged conduct against best practice standards and guidelines, as tempered by the context and other factors.

Reasonable Steps: Analogies

Rules designed to affect conduct often condition benefits on the undertaking of ''reasonable steps.'' The initial proposal for (then) Rule 37(f) during the 2006 Amendment cycle, for example, would have barred rule-based sanctions if a party took ''reasonable steps'' to preserve.

After public comments, the Committee adopted a different standard, *i.e.*, good faith, to measure acceptable conduct.[8]

At the Duke Conference of 2010, the E-Discovery Panel renewed the suggestion that a party which acts ''reasonably in the circumstances'' should be ''insulate[d]'' from sanctions.

The Rules Committee subsequently considered a proposed Rule 26.1 stating that a party ''must take [preservation] actions that are reasonable under the circumstances'' and a proposed Rule 37(e) that barred sanctions if a party complied with it.[9] The Committee ultimately dropped proposed Rule 26.1 because of concerns over pre-litigation rulemaking.

Other Analogies. Rule 45(d)(1) permits a party or an attorney issuing subpoenas to avoid ''sanctions'' if they take ''reasonable steps'' to avoid imposing undue burden or expense on a non-party recipient.

In *Western Convenience Stores v. Suncor Energy*,[10] the Hon. Craig B. Shaffer, a current member of the Rules Committee, observed that this ''impos[es] a standard of reasonableness on the attorney or party issuing the subpoena.''

Federal Rule of Evidence 502(b), adopted by Congress in 2008, permits a party to avoid waiver of the attorney client and work product privilege by taking ''reasonable steps'' in producing and clawing back inadvertently produced material.[11]

Courts have cautioned that the ''reasonable steps'' analysis must be applied without the benefit of hindsight, ''because no matter what methods [were] employed, an after-the-fact critique can always conclude that a better job could have been done.''[12] Perfection is not required.

In *First Technology Capital*, it was noted that ''as with any standard measured by what is reasonable,'' a flexible assessment of the conduct is involved in a case-specific context.[13]

Finally, an entity that takes ''reasonable steps'' to ensure that its compliance programs are ''generally effective'' may benefit under the United States Sentencing Guidelines even though it may ''fail[] to prevent or detect'' a criminal offense, since that does not necessarily mean that the program is not effective.[14]

Reasonable Steps: As Applied To Proposed Rule 37(e)

The Committee Report, text and Committee Notes necessarily will necessarily rely upon parties, commentators and the courts to give content to the phrase. In doing so, some basic principles will be involved.

Individual Determinations. First, and foremost, the ''reasonable steps'' approach to preservation under Rule 37(e) is not ''a strict liability rule that would automatically impose serious sanctions if information is lost.''[15] It will be necessary for the courts to assess the preservation efforts in individual cases under the totality of the circumstances without being distracted by the fact that some ESI is missing.

As one of the Subcommittee Members explained, ''reasonable steps are not perfect steps; information will be lost even when reasonable steps are taken to preserve it.''[16]

The Committee Note stresses that '' 'reasonable steps' to preserve suffice; it does not call for perfection.'' It also suggests that the level of sophistication and experience of the parties should be taken into account in evaluating preservation efforts.[17]

Importance of Policies, Procedures. Second, a showing of good faith adherence to neutral policies and procedures is important in identifying the existence of ''rea-

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[5] Minutes, Rules Committee Meeting, April 10-11, 2014 at lines 599-600.

[6] *Id.*, at lines 632-633 (''[the rule] is limited to circumstances in which a party failed to take reasonable steps to preserve information that should have been preserved, thus embracing a form of 'culpability' '')

[7] Committee Note, B-61 (''[b]ecause the rule calls only for reasonable steps to preserve, it is inapplicable when the loss of information occurs despite the party's reasonable steps to preserve'').

[8] *See* ''Changes Made After Publication and Comment,'' Supreme Court Transmittal to Congress, 234 F.R.D. 219, 375 (2006).

[9] Memo, Preservation Sanctions Issues, prepared for Rules Committee Meeting, Austin, Texas, April 4-5, 2011, at 200 & 207.

[10] 1:11-cv-01611, at 39 (D. Colo. March 27, 2014) (Shaffer, M.J.).

[11] FRE 502(b)(disclosure is not a waiver if inadvertent and the producing party took ''reasonable steps to prevent disclosure'' and also took ''reasonable steps to rectify the error'').

[12] *See, e.g., Rhoads Industries v. Building Materials Corp.*, 254 F.R.D. 216, 226 (E.D. Pa. Nov. 14, 2008).

[13] 5:12-cv-00289 (E.D. Ky. Dec. 10, 2013) (''the reasonableness of preventative steps surely includes both a design and an implementation component'').

[14] USCG Guidelines Manual, § 8B2.1, Para. (b)(listing ''reasonable steps'' which are ''minimally require[d]'' and, at Application Notes, Para. 2, the ''Factors to consider'' such as the fact that ''a small organization may meet the requirements of this guideline with less formality and fewer resources that would be expected of large organizations'').

[15] Minutes, Standing Committee Meeting, May 29-30, 2014 at 6 (quoting Judge David Campbell, Chair of the Rules Committee).

[16] Minutes, Rules Committee Meeting, April 10-11, 2014 at lines 737-738.

[17] Committee Note, at B-61.

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sonable steps.'' This is consistent with existing case law.[18]

The Committee intends that actions immunized by the current Rule 37(e) are to be acknowledged as ''reasonable steps.'' The Committee Note states that ''[a]s under the current rule, the routine, good-faith operation of an electronic information system would be a relevant factor'' in evaluating whether a party failed to take reasonable steps to preserve lost information.[19]

Following Best Practices. Similarly, adherence to best practices guidelines like those of the *Sedona Conference® Commentary on Legal Holds,* for example, may be evidence of a ''reasonable steps'' approach.[20] Many others exist. There is even an effort by the appropriate ESO/IEC Committee to develop an international ''code of practice'' for eDiscovery.[21]

Proportionality. Third, considerations of proportionality are relevant. The Committee Note points to the costs involved, noting that ''aggressive preservation efforts can be extremely costly'' and opines that a ''party may act reasonably choosing a less costly form of information preservation.''[22]

Moreover, since Rule 26(b)(1) is to be modified to be ''proportional to the needs'' of the case, so also should the duty to preserve reflect that reality, even if the current Committee Note does not, as its counterpart did in 2004, overtly reflect the linkage.[23] This may reflect a reluctance to acknowledge that proportionality serves as a preservation planning tool.[24]

However, it is clear, mentioned or not, that the scope of the potential discovery, assessed reasonably and in good faith at the time that planning decisions are made, is and will be highly influential.

As the court in *Rimkus*[25] noted, ''[w]hether preservation or discovery conduct is acceptable in a case depends on what is *reasonable*, and that in turn depends on whether what was done—or not done—was *proportional* to that case and consistent with clearly established applicable standards.''[26]

Examples

Litigation Holds. In *Zubulake v. UBS Warburg (''Zubulake IV''),* the court held that ''once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents.''[27]

Taking appropriate and timely action to identify and respond to the prospect of litigation is an important component of ''reasonable steps.''

It has become increasingly clear, however, that there is no single best way to do so, either as to the identification of the trigger or in the implementation of a litigation hold.

The rejection of the *Pension Committee* assertion that failure to use a written litigation hold is *per se* grossly negligent makes that point.[28]

When faced with the same set of facts, a wide range of responses can each qualify as ''reasonable steps,'' depending on the mix of considerations involved, a point made by the Chair of the Discovery Subcommittee in introducing the concept.

However, in *Sekisui American Corp. v. Hart*, the same court that decided *Pension Committee* imposed an adverse inference instruction because the party ''failed to meet even the most basic document preservation obligations.''[29]

From that de facto *per se* premise,[30] the court inferred that the destruction was of relevant and prejudicial evidence and expressed concerns that to do otherwise would ''incentivize'' bad behavior.[31]

The *Sekisui* approach is inconsistent with the requisite Rule 37(e) approach and with the rejection of the *per se* aspect of *Pension Committee* by the Second Cir-

[18] Petcou v. C.H. Robinson, Civil Action No. 1:06-CV-2157-HTW-GGB, at 6 (N.D. Ga, Feb. 25, 2008)(''[i]t does not appear that Defendant acted in bad faith in following its established policy for retention and destruction of emails'').

[19] Committee Note, at B-61.

[20] James S. Kurz, et. al., ''The Long-Awaited Proposed FRCP Rule 37(e)'' (2014) (''implementing and following the Guidelines will show that a party has taken the reasonable steps to navigate to the safe harbor described in the rule'').

[21] ANSI News Article, November 13, 2013, discussing ISO/IEC NP 27050-5 (''under development''), at http://www.ansi.org/news_publications/news_story.aspx?menuid=7&articleid=3789. See also Hibbard, Standards for Electronic Discovery, Ava Marie Law Journal (Summer 2014), copy at https://www.avemarialaw.edu/lr/Content/articles/v12i2.Hibbard.pdf.

[22] Committee Note, at B-61/62.

[23] The proposed Committee Note to Rule 37(f) provided in 2004 for the first use of ''reasonable steps'' provided that the outer limits of ''the reasonableness of the steps taken to preserve'' should be measured by the Rule 26(b)(1) scope of discovery and the Rule 26(b)(2)(B) accessibility limit since ''[i]n most instances, a party acts reasonably by identifying and preserving reasonably accessible [ESI].'' *See* Report, May 17, 2004, revised August 3, 2004, at 34-35, copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/comment2005/CVAug04.pdf.

[24] *Orbit One Communications v. Numerex Corp.*, 271 F.R.D. 429, 437 (S.D. N.Y. Oct. 26, 2010) (''reasonability and proportionality'' is much too ''amorphous'' to provide much comfort to a party deciding what file to delete or backup tapes to recycle'').

[25] *Rimkus Consulting Group v. Cammarata*, 688 F. Supp. 2d 598 (S.D. Tex. Feb. 19, 2010).

[26] *Id.*, 613 (emphasis in original).

[27] *Zubulake v. UBS Warburg (''Zubulake IV''),* 220 F.R.D. 212, 218 (S.D. N.Y. 2003).

[28] *Chin v. Port Authority,* 685 F. 3d 135, 162 (2d Cir. July 10, 2012)(rejecting ''the notion that a failure to institute a 'litigation hold' constitutes gross negligence *per se*'').

[29] *Sekisui American Corp. v. Hart,* 945 F. Supp. 2d 494, 508 (Aug. 15, 2013).

[30] *Id.* (the delay in establishing a litigation hold was ''inexcusable''). *See also* n. 78 (failure to timely institute a litigation hold was 'only one in an extensive list of Sekisui's document retention-related failures.''

[31] *Id.*, 509. *See also*, n. 51 (criticizing proposal to abrogate *Residential Funding* as to instances where evidence is negligently destroyed because it will ''create perverse incentives and encourage[s] sloppy behavior'').

cuit.[32] The totality of efforts undertaken in good faith should be examined.[33]

Other factors, such as application of proportionality and the lack of culpable intent may support a conclusion that ''reasonable steps'' were taken under all the circumstances.

Custodial Storage. One aspect of implementation will entail addressing the hard drives of current key custodians. Losses of information from files or devices of current or former employees after a duty to preserve attached are often sanctioned.[34]

The loss is often highlighted when information missing from a custodial file is secured from others and proves to be relevant. In *Jackson Family Wines*, for example, a provocative e-mail involving a former employee was secured by subpoena from a third party, leading to an adverse inference instruction and monetary sanctions.[35]

However, given the movement away from individual reliance on hard drives to shared information source on enterprise systems, storage in the clouds and archival storage, the role and nature of custodial files varies from case to case. In some cases, reasonable steps may require reliance on a substantial set of current and former custodial files; in others, not so much.

Auto-deletion. While it may sometimes be necessary to interrupt automatic deletion or limitation of hard drive-based ESI, the technology and case law has moved far beyond the simplistic argument that it is necessary, without exception, to do so, despite the cost or inconvenience of such a step.[36]

It may well be a ''reasonable step'' to simply instruct users to avoid the deletion by moving a copy to a file not subject to the policy. In *Mastr. Adjustable Rate Mortgages*, a litigation hold that relied upon custodians to send e-mail to a litigation hold folder without suspending the auto-delete function was deemed reasonable given the manner in which it was carried out.[37]

Databases. Since databases are dynamic systems, organized by field records and files, it can be important, depending upon the types of ESI which potentially may be sought in discovery, to determine the characteristics of the database models and management systems.

The preservation of information in a database is typically accomplished in an online or off-line manner, with the latter involving point-in-time copies. The Sedona Conference® publication on the topic is helpful in identifying reasonable steps for compliant conduct.[38]

Backup Systems. It has long been deemed a ''reasonable preservation step''[39] to avoid preservation of copies of backup media that make periodic copies of ESI for use during data loss events (''disaster recovery'') unless they are also used as an ''archive.''[40] Information is often available elsewhere.

This is a classic example of proportionality principles at work in the preservation context, and reflect the appropriate interpretation of the impact of Rule 26(b)(2)(B). Some entities also rely upon archiving of all incoming or outgoing e-mail as a backup measure.

Third Party Storage. Storage of information in third party sites (''the cloud'') present unique preservation issues that are largely dependent upon the terms negotiated as part of the cloud computing agreement. The same is true for failures to preserve text messages or other forms of ESI located on smartphones or tablets.

The interactive nature of media, text and imagery often ''do not fit'' typical preservation approaches and ''reasonable steps'' that rely on the requesting party to initiative discussion or seek relief may be appropriate.

Conclusion

The *Zubulake* line of cases and its progeny can be seen as an effort to impose standards for what are ''reasonable steps,'' typically along fairly absolutist lines. However, those cases stem from an interpretation of *Residential Funding* that has been rejected by the Rules Committee and by a subsequent panel of the Second Circuit itself.

Instead, a flexible ''case-by-case'' approach is indicated, acknowledging that perfection is neither a goal nor a mandate, and that parties may choose among a variety of options in a particular case.

Ironically, this use of ''reasonable steps'' returns us full circle to the underlying premise of current Rule 37(e): that in the absence of bad faith, efforts can be sufficient even where ESI is not perfectly preserved.[41] Under this logic, a multiplicity of approaches to the familiar challenges of preservation are equally permissible.[42]

Hopefully, over time, as parties gain confidence that they can confidently rely on the rule, the ''reasonable

[32] *Chin, supra*, 685 F. 3d 135, 162 (2d Cir. July 10, 2012)(holding that a failure to adopt what a court may regard as ''good preservation practices'' is but one factor to consider in deciding if sanctions should issue).

[33] *In re Pfizer Inc. Securities Litigation*, 288 F.R.D. 297, 318 (S.D. N.Y. Jan. 8, 2013) (''[a]lthough its efforts may not have been perfect, Pfizer did endeavor to meet all its obligations once additional document depositories were identified and did produce an additional 20 million pages of documents'').

[34] *Cache La Poudre v. Land O' Lakes*, 244 F.R.D. 614, 629-630 (D. Colo. March 2, 2007) (finding violation of duty to preserve by expunging hard drives of key former employees after litigation began).

[35] *Jackson Family Wines v. Diageo North America*, 2014 BL 41276 (N.D. Cal. Feb. 14, 2014).

[36] *Cf Voom v. EchoStar*, 93 A.D. 3d 33, 939 N.Y.S. 2d 321, at 327-328 (S.C. App. Dist. 1st Dept. Jan. 31, 2012)(applying *Pension Committee* and sanctioning party for reliance on employees).

[37] *MASTR Adjustable Rate Mortgages Trust*, *supra,* 295 F.R.D. 77, 84-85 (S.D.N.Y. Oct. 23, 2013) (''the litigation hold that U.S. Bank finally imposed was reasonable'').

[38] *See especially* The Sedona Conference® Database Principles Addressing the Preservation & Production of Databases & Database Information in Civil Litigation (2014), copy at http://www.thesedonaconference.org.

[39] *Gaalla v. Citizens Medical Center*, 6:10-cv-00014 at 2 (S.D. Tex. May 27, 2011).

[40] *Zubulake IV*, 220 F.R.D. 212, 217-218 (S.D.N.Y. Oct. 22, 2003) (except for identifiable tapes storing documents of key players when the information is not otherwise available).

[41] *Petcou v. C.H. Robinson*,Civil Action No. 1:06-CV-2157-HTW-GGB, at 6 (Feb. 25, 2008)(''[i]t does not appear that Defendant acted in bad faith in following its established policy for retention and destruction of emails'').

[42] Committee Note, at B-61 (''the routine, good-faith operation of an electronic information system would be a relevant factor for the court to consider in evaluating whether a party failed to take reasonable steps'').

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steps'' criteria will both simultaneously promote compliance and help reduce unnecessary over-preservation. There is some reason for optimism in this regard.[43]

[43] *See, e.g.*, EDI Panel Transcript (October 2013), at 13 (quoting Jon Palmer of Microsoft as stating that if a suitable rule were enacted he ''would no longer put entire organizations under a hold when I know that there are three or four key players within the organization are going to have all of the relevant material''), copy at http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-1680.