THE ROCKET DOCKET NEWS

The Newsletter of the Northern Virginia Chapter of the Federal Bar Association

SEPTEMBER 2014

The President's Report

By Damon W. D. Wright

The Wright Administration is coming to a close. In less than two weeks, Caitlin Lhommedieu will take over the helm. Caitlin has served tirelessly on our Chapter's Board for several years, perhaps most notably in leading the highly popular "Annual Welcome to the Courthouse" event for new Virginia Bar members. No doubt, Caitlin will have great success in leading one of the most vibrant Federal Bar Association chapters in the country. And, as with my term, we will have another fun and whirlwind year.

What I have enjoyed most over the past year is being part of a highly effective and efficient team and the camaraderie that comes with it. Our team is losing some very valuable members, but will be bolstered by some superb additions. Immediate Past-President Scott Caulkins, well-respected for his wisdom and judgment, deserves tremendous credit for expanding the breadth of our Chapter's events and activities over the past few years. Our departing Vice President George Kostel has been a force in expanding our membership rolls and strengthening our relations and profile with the national organization. Fortunately, George will continue serving our Chapter with several new initiatives. Craig Reilly is also leaving and his wit will be very missed at our Board's monthly meetings, although he will continue his leadership and dynamic presentation with the "Annual Bench-Bar CLE." Finally, Anne Devens is leaving the Board, after faithfully

IN THIS EDITION . . .

The President's Report (cont'd)

serving several roles over the years as Secretary, Treasurer, and Co-Editor of The Rocket Docket News.

That said, we are excited to have several new Board members who share the same character and commitment to our legal community. We are joined by Dan Mauler of Redmon Peyton & Braswell. Dan has already volunteered for a new informal position as our Chapter's photographer, and he is the co-author of an informative article in this issue about possible amendments to Rule 37(e). A frequent attendee at the Chapter's CLEs, Tara Zurawski of Jones Day, is also joining us. Tara clerked for Judge Hilton, has volunteered to handle applying for CLE accreditation, and recently enjoyed a huge win in a challenging pro bono Section 1983 civil rights case. We are also joined by Robert Veith of the steadily-growing law firm Leach Travell Britt. Bob, well-known as an excellent Northern Virginia commercial litigator for years, will ensure that our Chapter's events and activities continue to be publicized on the Federal Bar Association's website www.fedbar.org. Last but not least, Ellen Marcus has joined our Board. Ellen clerked for Judge Brinkema and recently joined Holmes Costin & Marcus, where she is a partner with fellow Board Member and soon-to-be Treasurer Kathleen Holmes.

Our Chapter benefits from involvement by all of its members. Please let any Board member know if you would like to write an article for The Rocket Docket News, would like to organize and present a CLE, would like to participate in the community on "Law Day," or have any other idea on ways to contribute. During the Lhommedieu Administration, please also stay tuned for a new Chapter initiative being spearheaded by Chip Molster, Scott Caulkins and George Kostel. In consultation with the Court, our Chapter is now developing plans to train attorneys to handle, on a pro bono basis, court-appointed limited representation of pro se litigants at mediation. You can expect to hear more about this worthwhile, and potentially very helpful, project in the coming months.

A final note. We have three important events over the next few weeks that you should not miss. On Monday, September 29, we will hold the Annual Law Clerk Reception and Torrey Armstrong Memorial Lecture at the Masonic Memorial, featuring Stuart Raphael, the Solicitor General for Virginia. On Wednesday, October 1, Tom Spahn will conduct his annual and always entertaining ethics CLE at the Court. On Thursday, October 30, we will hold our Chapter's 2014 Golf Classic at the Army-Navy Country Club. When you see the departing Board members, please thank them for their service! And, when you see the incoming, please give them your warm congratulations!

Judge Jones Retiring, Court to Appoint New Magistrate Judge

Magistrate Judge Thomas Rawles Jones, Jr. has announced his retirement, effective February 28, 2015. The Court has initiated the process of appointing a new Magistrate Judge, naming a Merit Selection Panel to provide a recommendation to the Court. The Panel members are: William B. Cummings, Esq. (Chair); Kathleen O. Barnes, Esq.; Robert Hawthorne; Kathleen J.L. Holmes, Esq.; John D. McGavin, Esq.; Timothy J. McEvoy, Esq.; and Dr. Rodger Schlickeisen. The Panel received applications in August and will soon make its report to the Court for consideration.

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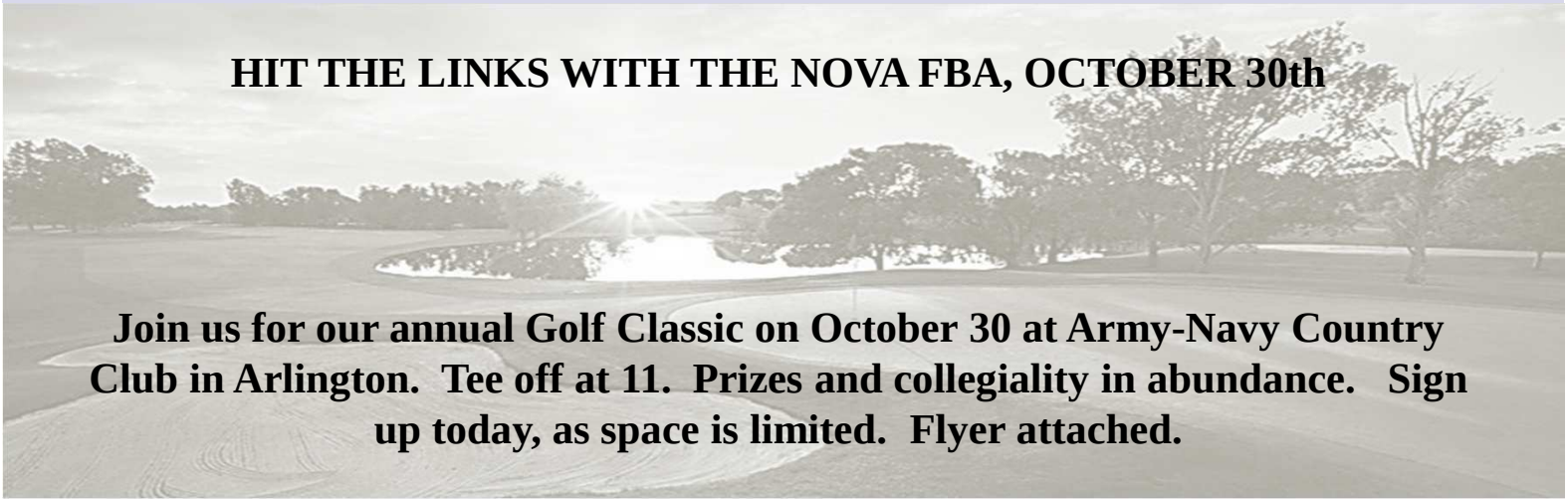
Members of the Northern Virginia Chapter are encouraged to submit articles or news information of interest to other members of the Northern Virginia Chapter for possible publication in the Rocket Docket News. Please submit any proposed articles or news information to the Editors at the telephone numbers and e-mail addresses listed above. The Editors reserve the right to decide on publication, and any articles accepted for publication are subject to editing.

Upcoming Events

NEXT WEEK:

- **MONDAY – *Torrey Armstrong Lecture and Law Clerk Reception*.** Please join the Chapter for the annual Torrey Armstrong Memorial Lecture and Judicial Law Clerk Reception, to be held this coming Monday, September 29, 2014, from 5:00-7:30 at the George Washington Masonic Memorial in Old Town Alexandria. This year's keynote speaker is Stuart Raphael, the Solicitor General of Virginia. Following Stuart's remarks, the Chapter will have an opportunity to meet the newest law clerks of the Eastern District of Virginia and then socialize with food and beverages. No charge and plenty of free parking. Come early and take in the view from the top of the Memorial. Flyer attached to the end of the newsletter. We hope to see you there!

- **WEDNESDAY – *Annual Ethics CLE with Tom Spahn*.** On Wednesday, October 1, from 3:00-5:00 in the Jury Assembly Room at the Federal Courthouse, the FBA will present its annual ethics CLE. The speaker is the one-and-only Tom Spahn! This two-hour program is the second of Tom's lectures about "What Lawyers Can Do and Where They Can Do It." Tom will address practicing law in states where a lawyer is not licensed; the permissibility of lawyers giving advice about the law of states where they are not licensed; the ability to practice "virtually" in other states; litigators' ability to be admitted in another state's courts; permissible temporary practice by lawyers in states where they are not licensed (in both the litigation and the transactional context); the rules governing lawyers moving permanently to another state; the ability of lawyers not licensed in the state where they practice to represent clients before federal agencies, in federal court and in matters involving federal law; limitations on in-house lawyers practicing in states where they are not licensed; the ability of foreign lawyers to practice in the US. These are no longer esoteric issues, but everyday problems for all lawyers to consider. Two hours of live ethics CLE credit. Flyer attached to the end of the newsletter.



HIT THE LINKS WITH THE NOVA FBA, OCTOBER 30th

Join us for our annual Golf Classic on October 30 at Army-Navy Country Club in Arlington. Tee off at 11. Prizes and collegiality in abundance. Sign up today, as space is limited. Flyer attached.

The FBA'S Annual Bench-Bar CLE Explores Rule 45 Subpoenas

By Craig C. Reilly

On May 19, 2014, the Northern Virginia Chapter of the Federal Bar Association hosted the annual Bench-Bar CLE seminar on federal practice and procedure in the Rocket Docket. Each year, the four sitting United States Magistrate Judges participate—sharing their insights, providing words of caution, and enlightening the attendees about the hot topics in federal practice. This year was no exception, as the Magistrate Judges trained their focus on the recent amendments to Rule 45 regarding the issuance and service of civil subpoenas for discovery and trial. Here are some of the highlights:

Issuance and Service: Under revised Rule 45, all subpoenas "must issue from the court where the action is pending." FED.R.CIV.P. 45(a)(2). Once issued, nationwide service is permitted: "A subpoena may be served at any place within the United States." FED.R.CIV.P. 45(b)(2). Essentially, then, the idea of the local or territorial authority to issue or serve a subpoena has been eliminated. However, as is discussed next, the limitations on the ***place of compliance*** and ***place of enforcement*** may still keep litigation regarding subpoenas largely local to the recipient.

Place of Compliance: With the elimination of the territorial limits on place of issuance and place of service, the principal territorial limitation is the "place of compliance," which is found in revised Rule 45(c). Although the revisers identify Rule 45(c) as "new," it actually incorporates "the various provisions [of the existing rule] on where compliance can be required and simplifies them." FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES, Rule 45, Adv. Com. Notes, 2013 Amendment, at 226 (Westlaw 2014). Accordingly, Rule 45(c) is the real roadmap within the rule.

Rule 45(c) makes a categorical distinction between subpoenas for testimony and those for "other discovery." FED.R.CIV.P. 45(c)(1) & (2). Each provision makes further distinctions.

Testimony: Generally, the "place of compliance" for giving deposition or trial testimony is "within 100 miles of the where the person resides, is employed, or regularly transacts business in person." FED.R.CIV.P. 45(c)(1)(A). There are two important exceptions to this general rule.

First, if the "person" subpoenaed for testimony at a trial "is a party or a party's officer" that person may be compelled to appear anywhere "within the state where the person resides, is employed, or regularly transacts business in person," without regard to the 100-mile limit stated in (c)(1)(A). FED.R.CIV.P. 45(c)(1)(B)(i). Although this provision is broader than that for other witnesses, this provision is actually an express limitation on service that addresses a split in the case law that was colloquially known as the "*Vioxx* Problem." Based on the 1991 version of Rule 45, some courts allowed nationwide subpoena power over parties and corporate officers to compel trial testimony, while others did not. *Compare In re Vioxx Prods. Liability Litig.*, 438 F. Supp. 2d 664 (E.D. La. 2006) (allowed), with *Johnson v. Big Lots Stores, Inc.*, 251 F.R.D. 213 (E.D. La. 2008) (not allowed). Now it is clear that there is no nationwide subpoena power over parties and corporate officers—only state-wide.

The FBA'S Annual Bench-Bar CLE Explores Rule 45 Subpoenas (cont'd)

Second, trial subpoenas may have state-wide effect for all witnesses, subject to a "substantial expense" exception. FED.R.CIV.P. 45(c)(1)(B)(ii). That is, if a trial witness must travel in-state more than 100 miles at "substantial expense," the party serving the trial subpoena may be ordered to pay those costs.

Other Discovery: The "place of compliance" for an inspection of premises is, of course, on-site. FED.R.CIV.P. 45(c)(2)(B) (a subpoena for "inspection of premises" must command compliance "at the place of inspection"). The "place of compliance" for production of documents, electronic records, or other tangible things, by contrast, is not the place where those items are located. Instead, the production may be compelled "within 100 miles of where the ***person*** [served with the subpoena] resides, is employed, or regularly transacts business in person." FED.R.CIV.P. 45(c)(2)(A) (emphasis added). Why is the place of compliance determined by the location of the ***person*** served?

A subpoena for documents may command production of "designated documents, electronically stored information, or tangible things in that ***person***'s possession, custody, or control." FED.R.CIV.P. 45(a)(1)(A)(iii) (emphasis added). In the case of a subpoena to an individual, the "place of compliance" rule may be applied in a straightforward manner. An individual is deemed to have "possession, custody, or control" his or her own documents, and may be compelled produce them "within 100 miles of where" he or she resides or works.

If the subpoena is issued to an entity (like a corporation), however, you must connect-the-dots within the Rule to find the proper "place of compliance." First, you must recall that in 1991, the revisers explained that "the person subject to the subpoena to compel a non-party is required to produce materials in that person's ***control whether or not the materials are located within the territory within which the subpoena can be served***." ADV. COM. NOTES, 134 F.R.D. 525, 670 (1991) (emphasis added). Thus, the location of corporate documents is not determinative of the "place of compliance;" instead, what matters is the location of the "person" who has "control" of them. Second, you must figure out who has "control" of the corporate documents. Usually, that would be a corporate officer or other individual who, under law, is deemed to have "control" of corporate records. But is that the only "person" on whom the subpoena may be served? Probably not. Some courts allow the subpoena to be served on a local registered agent, even if the corporation is headquartered in another state and the documents and records are located there.

Place of Enforcement: Even though a Rule 45 subpoena is now issued in the name of the district court in which the action is pending, enforcement of, or relief from a subpoena, is adjudicated in the district where compliance is required. *See* FED.R.CIV.P. 45(d); FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES, Rule 45, Adv. Com. Notes, 2013 Amendment, at 227 (Westlaw 2014) ("subpoena-related motions and applications are made to the court where compliance is required"). If the compliance is required in the district in which the action is pending, then the party moving to compel, or the non-party seeking a protective order, simply files the appropriate motion in the trial court.

If the place of compliance is another district, however, then the movant opens a miscellaneous action in the ancillary court for a ruling on the motion. Nonetheless, the 2013 revisions authorize ancillary courts to "transfer" a subpoena-related motion to the court where the action is pending. FED.R.CIV.P. 45(f). The authority to transfer is limited to instances where the subpoena-recipient has consented or there are "exceptional circumstances." *Id*. To be sure, the transfer of a subpoena-related motion could be burdensome on the subpoena-

The FBA'S Annual Bench-Bar CLE Explores Rule 45 Subpoenas (cont'd)

related motion could be burdensome on the subpoena-recipient, but transfer may enable the trial court to make more definitive rulings on privilege or relevance than could be rendered in the ancillary court.

The bottom-line: Knowing how Rule 45 has evolved over the years will allow you to use the current version more effectively, and save you from making errors when issuing, serving, complying with, enforcing, or resisting subpoenas.

Judge Brinkema and Tom Spahn Highlight the Annual Luncheon

By Damon W.D. Wright

On June 20, 2014 at the Westin Hotel, our Chapter held its Annual Luncheon featuring Judge Brinkema's State of the Court address. With about seventy attendees, the event was at capacity – a testament to how vibrant and connected our legal community has become. Over a dozen of our Chapter's Past-Presidents, as well as several of the Court's judges, attended.

For opening remarks, Chapter President Damon Wright highlighted the chapter's many popular activities and successes over the past year, including its recent receipt of the Federal Bar Association's prestigious Presidential Achievement Award. Damon and Past-President Scott Caulkins then oversaw the election – and then congratulations of – incoming Chapter officers, as well as new Board members Dan Mauler of Redmon Peyton & Braswell, Tara Zurawski of Jones Day, Robert Veith of Leach Travell Britt, and Ellen Marcus of Holmes Costin & Marcus. Past-President Sean Murphy then took the podium and shared fond stories about his dynamic McGuire Woods litigation partner and ethics guru Tom Spahn.

By this point, it may have dawned on Tom why Sean had insisted he attend the Annual Luncheon. Following thunderous applause, Tom was awarded our Chapter's Presidential Excellence Award for his dedication and service to our legal community. As is his style, Tom received the honor with humor and humility. As all those who attended and all those reading know, Tom has faithfully taught the chapter's annual ethics CLE for countless years now and in the process has helped to keep all of us in good standing with the Virginia Bar. And, over those mandatory two hours each year, he has also kept all of us thinking and laughing. The previous recipients of the Chapter's Presidential Excellence Award are Bill Dolan and Bill Cummings. They and Tom are in very good company.

The luncheon closed with Judge Brinkema's State of the Court address. She shared patterns and statistics about the Court's docket and noted that the Alexandria Division remains far and away the fastest federal court in the country. The Annual Luncheon is no Thanksgiving feast. But, as Judge Brinkema shared these and other thoughts, the consensus was that we are grateful.

Thanks to Our Past Chapter Presidents

From L to R (front row): Michael Nachmanoff, Attison Barnes, Judge Anderson, Judge Buchanan

From L to R (back row): Damon Wright, Chas McAleer, Sean Murphy, Jack Coffey, Scott Caulkins, Bill Cummings

Not Pictured: Phil Harvey

The Long-awaited Proposed FRCP Rule 37(e), its Workings, and its Guidance for ESI Preservation

James S. Kurz, Daniel D. Mauler, and Jacquelyn A. Jones
Redmon, Peyton & Braswell, LLP

The FRCP rule-makers have sent to the U.S. Judicial Conference for consideration in September 2014 their electronically stored information (ESI) preservation rule, proposed Rule 37(e). Judge David Campbell, the chair of the Advisory Committee on Federal Rules of Civil Procedure, has said that "37(e) is the most challenging task any of us on the committee have ever undertaken."

The proposed rule presents a uniform process and standard which will resolve the split among the circuits on the availability of the most serious ESI spoliation sanctions. Proposed Rule 37(e) will replace entirely the current subpart, and, as stated in the Committee Note, "forecloses reliance on inherent authority or state law to determine when certain [curative or sanctioning] measures should be used." The new standard will permit the most serious sanctions only when there is proof of an "intent to deprive" the harmed party of the use of the ESI in its case.

The new Rule 37(e) will also be the only civil rule that speaks, albeit indirectly, to the duty to preserve ESI. The rule-makers provide for the first time a genuine safe harbor for those who take timely "reasonable steps" to preserve ESI. While this may appear to be only abbreviated guidance, the chosen wording taps into case law and literature that offer substantial definitions of the processes businesses should follow in ESI preservation.

Proposed Rule 37(e) reads:

Proposed Federal Rule 37(e)

FAILURE TO 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 the information, and the information cannot be restored or replaced through additional discovery, the court may:

(1) Upon a finding of prejudice to another party from loss of the information, order measures no greater than necessary to cure the prejudice;

(2) Only upon a finding that the party acted with the intent to deprive another party of the information's use in the litigation,

(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.

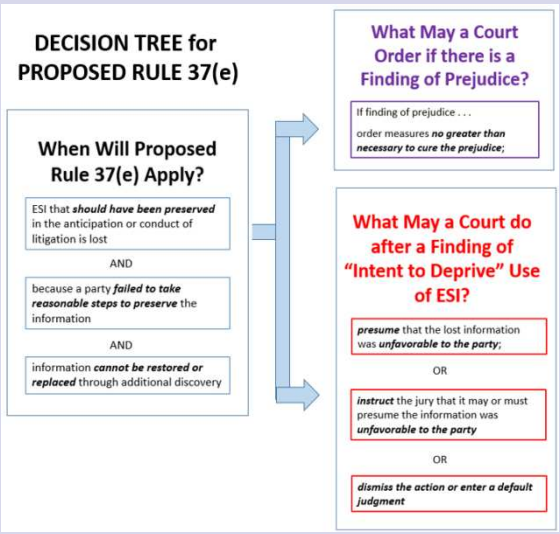
The Long-awaited Proposed FRCP Rule 37(e) . . . (cont'd)

Section I of this commentary introduces proposed Rule 37(e). Section I.A maps the rule, while I.B offers a summary of the rule's history and of the road ahead. Section 1.C parses Rule 37(e) drawing on the Committee Note. In Section II, the coverage turns to the practical side of the safe harbor offering. Section III summarizes.

I. THE PROPOSED ESI PRESERVATION RULE

The U.S Judicial Conference Committee on Rules of Practice and Procedure (the "Standing Committee") approved in late May 2014 proposed Rule 37(e). The Advisory Committee's Judge Campbell explains that the proposal sent to the Standing Committee "moved toward a more simple and modest rule . . ...."

Given the complexity of the challenge, the rule on its surface is surprisingly simple—the following graphic maps the Decision Tree for the rule in three stages.



First, rather than generally dealing with lost evidence, the proposed rule addresses only lost ESI. The Rule applies only when a 3-part test is met, essentially providing a safe harbor. Second, if there is a finding of prejudice because the ESI has been lost, then a court may impose remedies to cure the prejudice, but no more. And third, the most serious remedies may only be utilized after a finding of "intent to deprive" the use of the lost ESI. Parts 2 and 3 are separate—a litigant does not have to satisfy the "prejudice" finding necessary for Part 2 to get to Part 3.

A. The Road to the Proposed Rule and the Way Ahead

Understanding the challenge of addressing ESI spoliation begins with recognizing that the volume of ESI files expands at warp speed. Businesses must manage their ESI or else be buried in their data. Routine deletion of ESI has become an accepted part of the ESI management process. The U.S. Supreme Court in *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005) recognized that these processes "which are created in part to keep certain information from getting into the hands of others, including the Government, are common in business," and that it is "not wrongful for a manager to instruct his employees to comply with a valid document retention policy under ordinary circumstances."

But one party may view the opposing party's ESI management as the destruction, of relevant evidence. A consequence of this conflict coupled with legal uncertainties as to the resolution has produced a series of high-stakes, high-cost spoliation battles.

The Long-awaited Proposed FRCP Rule 37(e) . . . (cont'd)

The ESI Preservation Rule must referee these battles, and hopefully defuse them.

During the consideration of the 2006 rules amendments, the fight over how to handle ESI preservation and spoliation was the greater part of the debate. As the debate raged on, the rule-makers appreciated that while they could defer for several years, eventually they would have to address head-on the ESI preservation and spoliation issue. Following the 2010 Duke Conference, which was convened primarily to start the process towards promulgation of a revised Preservation Rule, and a 2012 Dallas mini-conference, a package of proposals, including a proposed Rule 37(e), was published in August 2013. Since publication, these proposals have attracted more than 2,300 written comments.

The Advisory Committee met in April 2014 in Portland, Oregon to consider the revised rules package. An earlier version of proposed Rule 37(e) in the Agenda Book was by-passed on Day 1 of the meetings. This soon-to-be discarded version employed the terms "bad faith" and "willful," which had become the hot-button words in the debate, and offered a list of factors a court might consider. A substantially rewritten and shortened proposal appeared the next morning. It is the rewritten proposed rule with a later-added Committee Note that emerged.

The revised proposed Rule 37(e) went before the Standing Committee in late May 2014. The Standing Committee approved the proposed rule with just a few changes to the Committee Note. The proposal will soon be before the Judicial Conference. If approved, as expected, then the package will move to the Supreme Court and then to Congress. If the Court adopts the changes before May 1, 2015, and Congress leaves the proposed amendments untouched, the amendments will become effective December 1, 2015.

B. Proposed Rule 37(e) Parsed

The rule-makers see proposed Rule 37(e) as the single rule for dealing with lost ESI. As confirmed in the Committee Note, the proposed rule is intended to replace entirely current Rule 37(e) and eliminate analysis of ESI spoliation issues grounded on a court's inherent authority.

The rule will resolve the current split among the circuits, explicitly rejecting the Second Circuit's position.

> **Committee Note:** It rejects cases such as *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002), that authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence.

The Second Circuit's negligence analysis represents one end of the spectrum on the requisite showing to support an adverse inference instruction. In contrast, the Tenth Circuit rejects this approach, and requires proof of bad faith loss of the information. *See, e.g., Aramburu v. Boeing Co.*, 112 F.3d 1398, 1407 (10th Cir. 1997) ("The adverse inference must be predicated on the bad faith of the party destroying the records. Mere negligence in losing or destroying records is not enough

The Long-awaited Proposed FRCP Rule 37(e) . . . (cont'd)

because it does not support an inference of consciousness of a weak case.")

Regarding reliance on a court's "inherent authority" as an alternative basis for imposing sanctions, the Committee Note reads:

> **Committee Note:** It therefore forecloses reliance on inherent authority or state law to determine when certain measures should be used. The rule does not affect the validity of an independent tort claim for spoliation if state law applies in a case and authorizes the claim.

A court's inherent authority has become for some courts the source of the authority to deal with ESI spoliation, including the authority for imposing even the most serious spoliation sanctions.

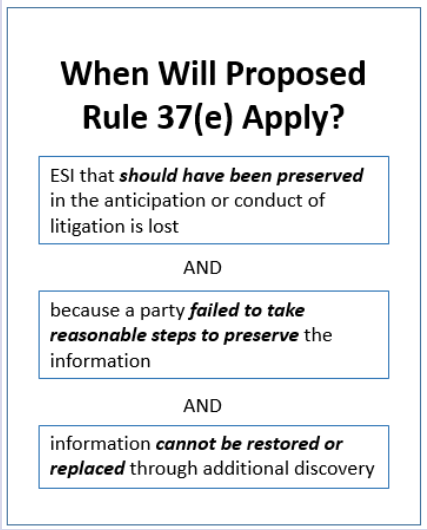
For example, in *The Pension Committee of the University of Montreal Pension Plan. v. Banc of America Securities, LLC,* 685 F. Supp. 2d 456, 464 (SDNY 2010), Judge Scheindlin writes that the "right to impose sanctions for spoliation arises from a court's inherent power to control the judicial process and litigation." According to Judge Scheindlin, the court's inherent authority to punish spoliation arises from "the need to preserve the integrity of the judicial process in order to retain confidence that the process works to uncover the truth."

The rule-makers would eliminate entirely this "inherent authority" basis for spoliation sanctions.

The proposed rule has three parts: (1) The 3-step test for when the rule will apply, (2) "prejudice" and the middle ground remedies, and (3) proof of "intent to deprive" as the only route to the most serious sanctions.

1. When Does the Rule Apply? Is this the Safe Harbor Missing from the Current Rule?

The proposed rule addresses only lost ESI. Earlier versions of a replacement rule attempted much broader coverage. But on Day 2 of the Portland meetings, the proposal narrowed to just ESI, and further narrowed to only ESI lost because a party "failed to take reasonable steps to preserve."



The rule begins with the 3-step test shown in the graphic above and to the right.

a. ESI Preservation Duty and Trigger. The inquiry begins with the preservation trigger event—the proposed rule applies only to ESI "that should have been preserved in the anticipation or conduct of litigation . . ." The Committee Note confirms that this does not create a new duty to preserve, but draws on the existing common law duty:

The Long-awaited Proposed FRCP Rule 37(e) . . . (cont'd)

> **Committee Note:** Many Court decisions hold that potential litigants have a duty to preserve relevant information when litigation is reasonably foreseeable. Rule 37(e) is based on this common-law duty; it does not attempt to create a new duty to preserve. The rule does not apply when information is lost before a duty to preserve arises.

b. Reasonable Steps to Preserve. The proposed rule next limits its application to ESI that was lost "because a party failed to take reasonable steps to preserve the information . . ." The Committee Note explicitly identifies that only "reasonable steps" should be required:

> **Committee Note:** This rule recognizes that "reasonable steps" to preserve suffice; it does not call for perfection.

"Reasonable steps" stands as the safe harbor from spoliation sanctions that was heralded in the 2006 eDiscovery amendments, but which turned out to be an illusion. The pursuing party will show that ESI has been lost, and that the other party was on notice to preserve. The defense then likely centers, as least initially, on the preservation steps taken. If the defending party demonstrates that it took reasonable steps to preserve ESI, then the spoliation claim should fail.

The Committee Notes then adds proportionality as a factor:

> **Committee Note:** Another factor in evaluating the reasonableness of preservation efforts is proportionality.

By softening preservation requirements to what may be proportional to what is at stake, the rule-makers ratcheted downward the practical preservation requirements for routine litigation, including most employment cases. In the rule as drafted heading into the Portland meetings, proportionality was one of five factors in assessing a party's conduct. The proposed rule makes no mention of proportionality; coverage is relegated to the Committee Note. The Note also recognizes that the party's sophistication should be considered when a court analyzes whether a party realized what should have been preserved.

c. Will Curative Measures Remedy the ESI Loss? A court should not go any further in the analysis if the ESI loss can be "restored or replaced through additional discovery." The Committee Note repeats this point:

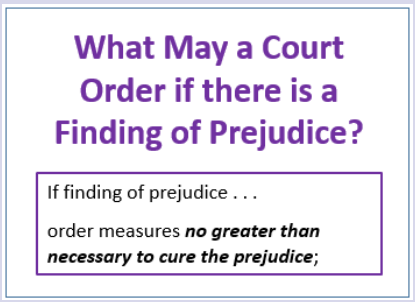
> **Committee Note:** Rule 37(e) directs that the initial focus should be on whether the lost information can be restored or replaced through additional discovery. . . . If the information is restored or replaced, no further measures should be taken.

In many ESI cases this third part will end the inquiry. What may appear to be lost often can be located elsewhere. For instance, a custodian's emails deleted from an Exchange database might be found on backup tapes, or possibly in another custodian's files. Before a court explores prejudice and searches for appropriate remedies, it must consider the possibility that seemingly lost ESI can be restored or replaced.

The Long-awaited Proposed FRCP Rule 37(e) . . . (cont'd)

2. If there is a Finding of Prejudice, what may a Court Order?

Only if the three-step test described above is met does a court continue with its analysis. The question in subpart (e)(1) of proposed Rule 37(e) is whether there is a "finding of prejudice." If so, then a court may reach into its bag of remedies, but may "order measures no greater than necessary to cure the prejudice." The remedies available at this stage do *not* include the most serious sanctions – the adverse inference instruction and dismissal. These sanctions may be imposed only under subpart (e)(2).



The Committee Note emphasizes that the proposed rule is purposefully vague on which party has the burden of proving or disproving prejudice.

> **Committee Note:** The rule does not place a burden of proving or disproving prejudice on one party or the other.

As to the available remedies, Judge Campbell explains that "one of our intentions is to preserve broad remedial powers for judges in (e)(1)." The Committee Note provides:

> **Committee Note:** The rule leaves judges with discretion to determine how best to assess prejudice in particular cases.

The available remedies are not listed, but case law identifies financial penalties, payment of attorneys' fees, evidentiary limitations, and maybe that certain facts are deemed proved. A close reading of the proposed rule and the Committee Note identifies these actions as remedies, not "sanctions."

3. A Court may give an Adverse Inference Instruction or may Dismiss Claims or Enter Default Judgment *only* after a Finding of an "Intent to Deprive" the Use of the ESI.

The center of the ongoing debate has been the required showing before a court may give an adverse inference jury instruction, dismiss claims, or enter a default judgment. As noted above, some courts have required proof of black-hearted destruction of ESI, while the Second Circuit has authorized giving an adverse inference instruction based on a finding of negligence or gross negligence. The rule-makers intend a uniform standard, and they reject the Second Circuit's approach. And, as explained above, the "inherent authority" avenue would be blocked.

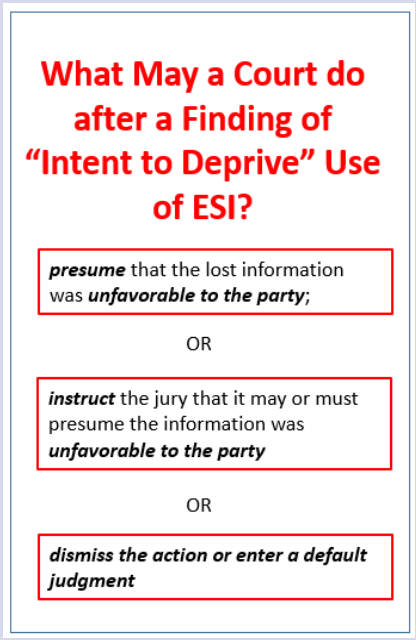
The Committee Note could not be clearer on this:

> **Committee Note:** It is designed to provide a uniform standard in federal court for the use of these serious measures when addressing failure to preserve electronically stored information. It rejects cases such as *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d

The Long-awaited Proposed FRCP Rule 37(e) . . . (cont'd)

> 99 (2d Cir. 2002), that authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence.

The chosen test centers on proof of "an intent to deprive." The proposed rule language reads: "Only upon a finding that the party acted with the intent to deprive another party of the use of the information in the litigation." If there is any confusion in this language, the Committee Note emphasizes the restriction:



> **Committee Note**: Subdivision (e)(2) limits the ability of courts to draw adverse inferences based on the loss of information in these circumstances, permitting them only when a court finds that the information was lost with the intent to prevent its use in litigation.

II. THE PRACTICAL SIDE: The "Reasonable Steps" Safe Harbor

If approved, then proposed Rule 37(e) will be the only federal civil rule that speaks to the scope of a party's duty to preserve. While the rule might appear threadbare, the debate history and literature provide guidance on "reasonable steps." Key in this history is the Sedona Conference's 2010 *Commentary on Legal Holds: The Trigger and the Process.*[i]

The rule-makers chose to provide only general directions for ESI preservation, not detailed rules. The Committee's Comments from the 2010 Duke Conference reveal that the Committee considered three approaches to answering the preservation issue. One was an explicit preservation rule that detailed when and how ESI must be preserved. A second option considered a general preservation rule, but still a "front-end" solution, that is, fairly explicit directions or guidelines for the ESI preservation process. The third option, a "back end" approach, focuses on the availability of a genuine safe harbor and the consequences for failure to preserve. The rule-makers pursued this last option, stating that a party should not be sanctioned if it has taken "reasonable steps to preserve the information."

The critical question then becomes what are the reasonable steps contemplated in the rule? The Sedona *Commentary* includes Guidelines for defensible preservation processes. From these Guidelines it is a fairly small step to specifying processes that provide an ESI preservation solution that should meet the proposed Rule 37(e) "reasonable steps" standard.[ii]

The Sedona *Commentary* distills the requirements to "reasonableness and good faith" with recognition of proportionality.

The keys to addressing these issues, as with all discovery issues, are

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> *reasonableness and good faith.* Where ESI is involved, there are also practical limitations due to the inaccessibility of sources as well as the volume, complexity and nature of electronic information, which necessarily implicates the proportionality principles, found in Rule 26(b)(2)(C)(iii).

As demonstrated above, these are building blocks for the proposed rule.

If the *Commentary* stopped after this recitation, then the assistance would be far too general. The *Commentary* goes on to offer its Guidelines for a sufficient Legal Hold, documentation of the preservation processes, and regular review.[iii]

The *Commentary*, and in particular Guidelines 8, 9 and 10, are seen as identifying the "reasonable steps" in proposed Rule 37(e). In other words, 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.

III. SUMMARY

The process leading to proposed Rule 37(e) began with the 2010 Duke Conference. If the amendment process stays on course, the replacement rule will become effective on December 1, 2015.

Proposed Rule 37(e) has an appearance of simplicity. This design is so the proposed rule will be the sole authority for federal courts to impose ESI spoliation remedies or sanctions; the court's "inherent authority" as a basis for spoliation sanctions is pushed aside. In practice, the proposed rule may well be relatively simple to apply. But appreciation of the rule comes only with an understanding of the issues, the history, and the ongoing debate.

Unlike most procedural rules, this proposed rule has substantial business implications. As demands to manage ESI increase, businesses are seeking guidance on what must be preserved to avoid spoliation claims and sanctions. The circuit split and vague directions have led to costly over-preservation. Proposed Rule 37(e) will be the single rule to provide ESI preservation guidance, including at least the identification of the "reasonable steps" that define a safe harbor.

[i] The Sedona Conference published a 2007 version of the *Commentary* which was revised in 2010.

[ii] As an example of a real-world solution designed based on the *Commentary* Guidelines, the article turns to J. Kurz, *A Trial Lawyer's Wish List: A Legal Hold and Data Preservation Management Solution* (accessed from the eDiscovery page on Redmon, Peyton & Braswell website (www.RPB-law.com).

[iii] Guidelines 8, 9 and 10 from the 2010 Sedona *Commentary* read:

Guideline 8

In circumstances where issuing a legal hold notice is appropriate, such a notice is most

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effective when the organization identifies the custodians and data stewards most likely to have relevant information, and when the notice:

a. Communicates in a manner that assists persons in taking actions that are, in good faith, intended to be effective
b. Is in an appropriate form, which may be written
c. Provides information on how preservation is to be undertaken
d. Is periodically reviewed and, when necessary, reissued in either its original or an amended form, and
e. Addresses features of relevant information systems that may prevent retention of potentially discoverable information.

Guideline 9

An organization should consider documenting the legal hold policy, and, when appropriate, the process of implementing the hold in a specific case, considering that both the policy and the process may be subject to scrutiny by opposing parties and review by the court.

Guideline 10

Compliance with a legal hold should be regularly monitored.

Authors

James S. Kurz

Daniel D. Mauler

Jacquelyn A. Jones
(*not pictured*)

Redmon, Peyton & Braswell, LLP

FBA 2015 Mid-year Meeting

March 28-30, 2015

"Look out for an event involving our Chapter."

See
http://www.fedbar.org/Education/Calendar-CLE-events/2015-Midyear-Meeting.aspx
for details

Law Day Report - What if? GW Middle School Students Appreciate the Importance of the Right to Vote

By Damon W.D. Wright

On May 1, 2014, several GW Middle School civics teachers sat back and watched with enthusiasm as attorneys Scott Caulkins, Stephen Cobb, Bill Porter, Kathleen Holmes, Todd Pilot and Damon Wright led their students in a vigorous and interesting discussion about the Voting Rights Act. Speaking to several classes, the attorneys traced our nation's history in not providing the right to vote to African Americans and women, obstacles that prevented the right to vote from being fully realized, as well as challenges that persist today – from long lines at polls to misleading flyers about when election day actually is. But the lecture was interwoven with a personal and interactive exercise for the now too-young-to-vote students.

Across each of several classrooms throughout the day, we asked the students to assume they could all vote and to assume a referendum was on the ballot in Virginia. The referendum, if passed, would lead to a law providing that all persons at least 13 years old would be entitled to drive. Taking eager volunteers, we heard students then passionately advocate on behalf of the car industry in favor of thirteen year olds behind the wheel and then students representing the insurance industry argue just as passionately against. There was vigorous discussion and debate all around. Some students were thrilled and others expressed alarm with the idea. We then took a vote. And a slim majority always celebrated.

We then changed the voting laws on them. No longer were all students allowed to vote, but rather the right to vote would be arbitrarily decided by the government. If you wear glasses or contacts, we jokingly explained that you may have trouble reading and understanding the issue before you. So students with glasses or contacts, we declared, could not vote. If you're wearing an orange, green, brown, or purple t- shirt, we explained that those colors are not found on the American Flag and thus you may not be patriotic enough … and thus you could not vote. To laughter we declared, if you're left-handed, well then you're not right-handed so you also could not vote. One by one, the previously eligible voters were narrowed to a few. And then a new vote was taken, and the outcome was different. The previous celebrating winners were now the losers. The previously disappointed losers were now the winners.

The students enjoyed and were vocal in sharing what they learned, saying it brought home for them how irrational and arbitrary our nation's voting laws once were, how denying the right to vote can unfairly and harshly impact people's lives, and even discussion about restrictions on convicted felons' right to vote and about the District of Columbia's residents not having a vote in Congress. As much as the students enjoyed this, so too did the attorneys. It was challenging, but also fun for all. This event was conducted as part of the American Bar Association's annual celebration of Law Day, and this was our Chapter's second annual foray in sponsoring a Law Day event. Stay tuned for the opportunity to participate next year.

Chapter Spring/Summer CLE Roundup

- ***National Electronic Evidence CLE Held at Courthouse***

On March 27, 2014, the Northern Virginia Chapter sponsored a CLE on electronic evidence entitled "Obtaining and Admitting Electronic Evidence in Federal Courts: An Interactive Discussion with Trial-Like Demonstrations." The program addressed social media and other electronic evidence, and was held in coordination with the FBA's Mid Year Meeting. The program was a collaboration between the Northern Virginia Chapter and the FBA's Federal Litigation Section, and was co-sponsored by the FBA Young Lawyers Division.

The program was very successful, with more than 60 attendees, including local lawyers and Judges, as well as out of town attendees of the Mid Year Meeting. Judge Gerald Bruce Lee graciously permitted the Chapter to use his courtroom for the program, which included U.S. Magistrate Judge Ivan D. Davis presiding over the trial-like demonstrations. The distinguished panel also included Federal Public Defender Michael S. Nachmanoff, Ann Marie C. Villifano (an AUSA from S.D. Fla.), Chapter President Damon Wright (Venable), Chapter Board member Stephen Cobb (Miles & Stockbridge), Geremy C. Kamens (Federal Public Defender Service), Ryan M. Sugden (Stinson Leonard Street LLP (Minneapolis)), and was moderated by Chip Molster (Winston & Strawn LLP). The program also included a reception at the Alexandria Westin, directly across the street from the Courthouse.

Plans are currently underway for another collaborative CLE next March, again in coordination with the FBA's Mid Year Meeting (March 26-28, 2015), and we will have more information on that program in our next newsletter.

- ***Annual Bench-Bar CLE – see article on p. 4.***

- ***Tim O'Toole Leads the U.S. Supreme Court Term in Review***

On July 22, 2014 at the Westin Hotel, our Chapter sponsored its annual and always riveting "SCOTUS Term in Review" luncheon and CLE. Once again, the event was led by Tim O'Toole from Miller & Chevalier with Don Ayer from Jones Day as a panelist. This year, we were also joined by Pratik Shah from Akin Gump. Together, these three seasoned U.S. Supreme Court advocates provided an entertaining, easy to follow, and informative recap of the U.S. Supreme Court's recently-completed term from Hobby Lobby, to AERO, to Riley v. CA, to McCutcheon v. FEC, and many other major cases affecting our work and our lives.

Thanks to the inspiration of one of our Past-Presidents, Chas McAleer and his dedicated firm partner Tim O'Toole, this annual event has become one of our most popular. Focused on the day-to-day, and our sometimes narrow practice focus, we all know it can be a challenge to stay current on all of the Court's decisions. But what can be so interesting about the CLE, and makes the CLE so worthwhile, is the opportunity to learn and think about decisions outside your specific practice area – decisions that impact you as a citizen and may also interest your clients, even if beyond what you do. All of the attendees, no doubt, came away educated and enriched. Tim, Don and Pratik, thank you very much.

Continued Success of Introduction to the Courthouse Program

This past April, the Alexandria Division admitted 25 new attorneys to practice in Eastern District of Virginia at the annual Introduction to the Court House event. More than 30 members of the courthouse family, including District Court Judges, Magistrate Judges, Bankruptcy Judges, the U.S. Attorney for the E.D. Va., the Federal Public Defender, members of the Clerk's Offices of both this Division and the Fourth Circuit, and the U.S. Marshal's Service kindly gave of their time to speak about how this Court functions. A total of more than 50 attendees came to the program to learn about details ranging from using technology in the court room to the Criminal Justice Act. We warmly welcome the new admittees, invite them to join the Federal Bar Association, Northern Virginia Chapter, and look forward to seeing them in practice here. The program will be held again in or around April 2015. For information about next year's program, please contact Caitlin Lhommedieu at (703) 851-3366 or cklhommedieu@gmail.com.

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Special thanks to Intelligent Office for providing the space for our Chapter's monthly meetings at their great location just down the street from the Courthouse, where they offer temporary office space and conference room rentals. Contact Matt Whitaker for details at 703-224-8800 or mwhitaker@intelligentoffice.com.

The Federal Bar Association
Northern Virginia Chapter

Sponsors the Annual Federal Law Clerk Reception and Torrey Armstrong Memorial Lecture

Featuring Stuart A. Raphael, Solicitor General for the Commonwealth of Virginia

Monday, September 29, 2014
George Washington Masonic Memorial
101 Callahan Drive
Alexandria, Virginia

Masonic Memorial Tour
5:00 – 5:30 pm
Torrey Armstrong Memorial Lecture
5:30 – 6:00 pm
Law Clerk Introductions
6:00 – 6:15 pm
Reception
6:15 – 7:30 pm

This is a Free Event
Members and Non-Members Are Welcome

The Federal Bar Association
Northern Virginia Chapter

Presents:

UPL, MDP and MJP
(Defining What Lawyers Do and Where They Can Do It): Part II

Featuring:
Tom Spahn
Partner, McGuireWoods LLP

Wednesday, October 1, 2014 3:00 p.m. - 5:00 p.m.

Albert V. Bryan U.S. Courthouse
401 Courthouse Square
Alexandria, VA 22314

2 Hours of CLE Credit

$60 - FBA Members **$75** – Nonmembers

This two-hour interactive program will use hypotheticals to address lawyers practicing law in states where they are not licensed, including: the effect of lawyers practicing law in states where they are not licensed; the permissibility of lawyers giving advice about the law of states where they are not licensed; the ability to practice "virtually" in other states; litigators' ability to be admitted in another state's courts; permissible temporary practice by lawyers in states where they are not licensed (in both the litigation and the transactional context); the rules governing lawyers moving permanently to another state; the ability of lawyers not licensed in the state where they practice to represent clients before federal agencies, in federal court and in matters involving federal law; limitations on in-house lawyers practicing in states where they are not licensed; the ability of foreign lawyers to practice in the US.

Make check payable to "Federal Bar Association, Northern Virginia Chapter" and mail with your registration form to:

Kathleen Holmes
Holmes Costin & Marcus PLLC
5203 Lyngate Court, Suite B
Burke, VA 22015
(703) 260-6401 (phone)
(703) 439-1873 (fax)
kholmes@hcmlawva.com

Last minute registrants may e-mail or fax your registration form in advance, and bring your check to the seminar

REGISTRATION FORM
Tom Spahn on Ethics 2014

October 1, 2014 – 3:00 p.m. to 5:00 p.m.

AT THE US DISTRICT COURTHOUSE IN ALEXANDRIA
401 COURTHOUSE SQUARE
ALEXANDRIA, VA 22314

Name:

_____

Business Address:

_____

_____

_____

Phone: ( ) _____ Fax:( ) _____

E-mail: _____

$60 - FBA Members **$75** – Nonmembers

TO JOIN THE FBA NORTHERN VIRGINIA CHAPTER, PLEASE VISIT: www.fedbar.org

Federal Bar Association — Northern Virginia Chapter 2014 Golf Classic

Lead Contact: George Kostel, Attorney, Polsinelli

SEE YOU:

Thursday, October 30, 2014

First tee time at 11:00 am

arrive as early as 10 am to practice on the new ANCC driving range

LOCATION:

Army-Navy Country Club

1700 Army Navy Drive

Arlington, VA

FORMAT: Scramble

PRIZES: Two Lowest Groups win pro shop credit

REGISTER: **Register early! Only 8 tee times available**

To register please contact George Kostel at gkostel@polsinelli.com or by phone at (202) 626-8316.

Formal invitation to follow.