_____ PROGRAM MATERIALS
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Understanding New FRCP Rules

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Federal Rules of Civil Procedure Update: Understanding New Rules, Standards, and Disclosure Requirements

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October 12, 2022

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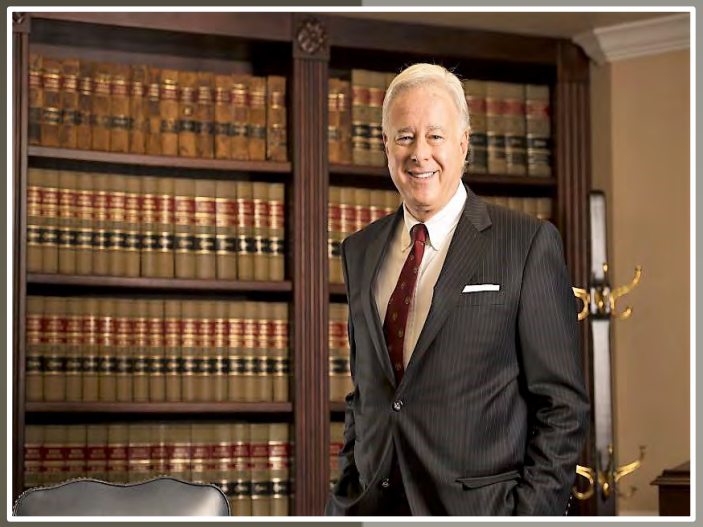
Dennis I. Wilenchik, Presenter



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- Managing Partner, over 40 years in practice.
- Former Deputy County Attorney, Maricopa County.
- Tried hundreds of cases, in federal and state court and is licensed in Arizona, District of Columbia, New York, Texas, the Ninth Circuit Court of Appeals and the United States Supreme Court.

Overview of the History of the Federal Rules of Civil Procedure

- 1938: Federal Rules of Civil Procedure established to secure the "just, speedy, and inexpensive determination of every action and proceeding."
- 1976: Chief Justice Burger convened the Pound Conference ("National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice") to address ADR and discovery abuses.
- Significant revisions were made in 1980, 1983, 1993, 2000, 2010, and 2015 to address discovery issues.
- This seminar focuses on the significant changes to the Rules in 2015 and how it affects your practice.

Background to 2015 Amendments

May 2010	August 2013	November 2013-February 2014	April-May 2014	April 29, 2015	December 1,2015
Civil Rules Advisory Committee and Duke E-Discovery Panel	Preliminary draft of the Amendments, circulated for public comment	Public Hearings More than 2,300 comments from attorneys, judges, academicians.	After Public Comment, Advisory Committee approved and Standing Committee approved	Congress and the United States Supreme Court accept and approve	New Rules in effect and govern all proceedings going forward and, if practical, pending proceedings.

Goals of 2015 Amendments

- Cooperation among parties;
- Proportionality in use of available procedures;
- Early and active Case Management.

Changes in Four Areas

- Timing;
- Discovery Provisions;
- Scope of Discovery; and
- Preservation of ESI.

Rule 1, FRCP

"These rules govern the procedure in all civil actions and proceedings in the United States District Courts, except as is stated in Rule 81. They should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceedings."

Is Cooperation Mandatory?

"Just to get the negotiation off on the right foot,
I don't intend to concede anything."

Cooperation is Not Mandatory, but….

- It is in the 2015 Advisory Committee Notes and is expected.
- Improvements to administering civil justice "regularly include pleas to discourage over-use, misuse, and abuse of procedural tools that increase cost and result in delay."

Chief Justice John Roberts on the 2015 Amendments

"As for lawyers, most will readily agree—in the abstract—that they have an obligation to their clients, and to the justice system, to avoid antagonistic tactics, wasteful procedural maneuvers, and teetering brinksmanship. I cannot believe that many members of the bar went to law school because of a burning desire to spend their professional life wearing down opponents with creatively burdensome discovery requests or evading legitimate requests through dilatory tactics. The test for plaintiffs' and defendants' counsel alike is whether they will affirmatively search out cooperative solutions, chart a cost-effective course of litigation, and assume shared responsibility with opposing counsel to achieve just results."

https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf

Rule 1, FRCP and Evolving Your Practice

- To fully comply with Rule 1, an attorney must be vigilant about learning the best ways to develop your case.
- This means incorporating technology into your practice.

The Sedona Conference: Ahead of Its Time

- The Sedona Conference: a 501(c)(3) research and educational institute with jurists, lawyers, experts, academicians to study law and policy in antitrust, complex litigation and intellectual property rights.
- 2008: The Sedona Conference published its Cooperation Proclamation, calling for a "paradigm shift" for the discovery process.
- We have included the Cooperation Proclamation in your materials.

Six Rules to Act Cooperatively

- Utilizing internal ESI discovery "point persons" to assist counsel in preparing requests and responses;
- Exchanging information on relevant data sources, including those not being searched, or scheduling early disclosures on the topic of Electronically Stored Information;
- Jointly developing automated search and retrieval methodologies to cull relevant information;
- Promoting early identification of form or forms of production;
- Developing case-long discovery budgets based on proportionality principles; and
- Considering court-appointed experts, volunteer mediators, or formal ADR programs to resolve discovery disputes.

The Sedona Conference Cooperation Proclamation, July 2008

The Ethical Emphasis on Technology

- "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefit and risks associated with relevant technology…." ABA Rule 1.1.
- Several states are making approved technology programs a mandatory continuing legal education requirement. Florida (2017) and North Carolina (2019).

With the Backdrop of Rule 1, Deep Dive into the other 2015 Amendments

Early and Active Case Management
Rules 4, 16 and 26, FRCP

Rule 4(m), FRCP

- If a defendant is not served within 90 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f), 4(h)(2), or 4(j)(1), or to service of a notice under Rule 71.1(d)(3)(A).

Rule 4(m), FRCP

- Shortens the time period to serve a defendant from 120 days to 90 days.
- If good cause is demonstrated, the Court MUST extend the time period for an appropriate time.
- This change, when accompanied with the shortened time for issuing a scheduling order under Rule 16(b)(2), will reduce the delay in litigation. (Committee Notes 2015 Amendment).
- Shortened notice period does not apply to service of a notice of condemnation proceedings under Rule 71.1(i)(C).

Rule 4(m), FRCP

- The Rule was amended again in 2016 to correct a possible ambiguity regarding service in a foreign country, which is often accomplished by means that require more time.

- The rule includes service on foreign defendants that are individuals, service on a foreign state or service on a corporation, partnership or association.

Rule 16, FRCP

- The judge must issue a scheduling order as soon as practicable, but unless the judge finds good cause for delay, the just must issue it with the earlier of 90 days after any defendant has been served with the complaint or 60 days after the defendant has appeared.

Fed.R.Civ.P. 16(b)(2)

Rule 16, FRCP

- The Rule 16 Amendments, when coupled with the parties' meet and confer and their report under Rule 26(f), require the parties to meet, complete their due diligence and negotiate a pretrial discovery plan.

Fed.R.Civ.P. 16(b)(2)

Rule 26(f)(1), FRCP Conference of the Parties

- Timing: as soon as practicable—and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), FRCP."

Rule 26(f)(2), FRCP Content and Responsibilities

- Nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case;
- Make or arrange for the disclosures required by Rule 26(a)(1);
- Discuss any issues about preserving discoverable information; and
- Develop a proposed discovery plan.
- Written report must be submitted to the court within 14 days after the conference.

Rule 26(f)(3), FRCP: Discovery Plan

- (C) any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced;
- (D) any issues about claims of privilege or of protection as trial preparation materials, including—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502.

Privilege Waivers and Careless Production

- Practice Tips:
  - Address the Rule 502 Order at the onset of your case and have it in place. *See, e.g., In re Qualcomm Litigation*, 2:17-CV-00108-GPC-MDD. (Apple waived its privilege because it could not show that it took any steps to prevent disclosure under Rule 502(b)(2).
  - *Irth Sols., LLC v. Windstream Commc'ns LLC*, No. 2:16-CV-219, 2017 WL 3276021, at *16 (S.D. Ohio Aug. 2, 2017)(claw back agreement was ambiguous and deficient, and privilege waived as to those documents but not subject matter waiver. Counsel is the "guardian" of the waiver, and the court will hold counsel accountable when the normal inadvertent waivers become "chasms.")

Practice Tip: Always Include a Rule 502 Order as Part of Discovery Plan

- Text of Rule 502(d), FRE: Controlling Effect of a Court Order. A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court — in which event the disclosure is also not a waiver in any other federal or state proceeding. Enacted in 2008 to minimize civil litigation costs.
- Benefits:
  - No-waiver effect applies in other state and federal court proceedings;
  - Parties incorporate a detailed and specific agreement regarding the scope and effect of litigation;
  - Privileged documents must be returned to disclosing party "irrespective of the care taken by" the party in reviewing them prior to production.
  - A 502 (d) Order is preferred over a 502(e) agreement because the agreement is only binding on the parties, and they still may have to go to the court to enforce. t agreement can be means that parties can reduce the length and costs of discovery process without fear of waiver.

Rule 26(a), FRCP

- Initial Disclosures must be made at or within 14 days after the parties' Rule 26(f) conference.
- If party is brought in after the parties' Rules 26(f) conference, Initial Disclosures are due 30 days after being served or joined.

Effective Meet and Confer Tips

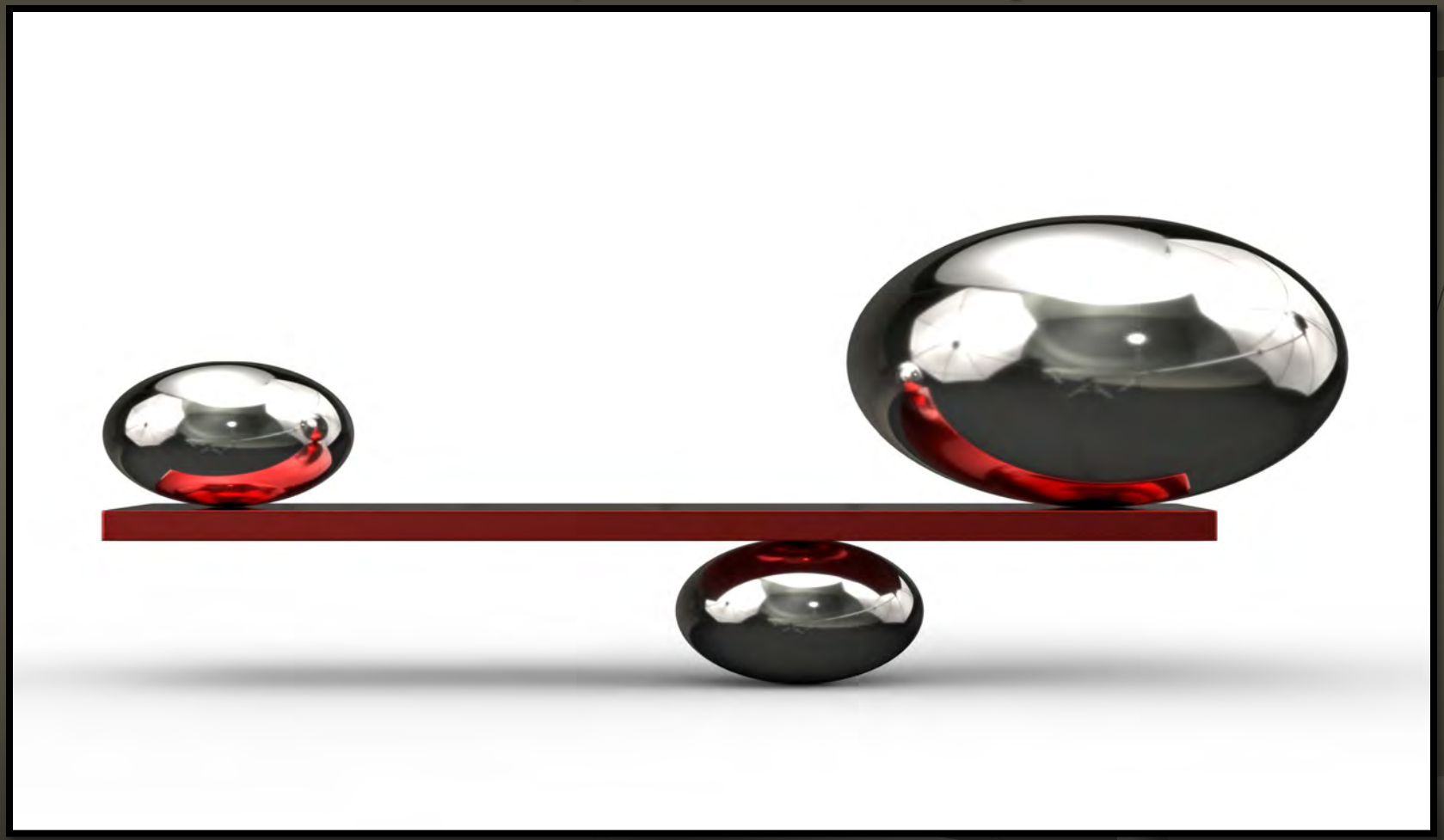
- Know the location of your data before the meeting.
- Determine the tools needed to collect.
- Ensure that it is being preserved on your side and the opposing party's side.
- Consider including your IT or e-Discovery representative and custodian in the process.
- Create the e-discovery protocol.
- Do not forget the Rule 502 Order.

Meet and Confer

- The Rule 26 e-discovery amendments Rules 26(a) and (f), Fed.R.Civ.P. require the parties to meet and confer, discuss issues regarding preserving discoverable information, form of production and privilege waivers.
- The Case Management Order should formalize the parties' ESI requirements.

  Model Joint Discovery Management Order, included.

Tailoring Discovery and Proportionality



Rule 26(b)(1)

- Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Rule 26(b)(1): Proportionality

- The Rule's six factors:
  - importance of the issues at stake;
  - amount in controversy;
  - parties' relative access to relevant information;
  - parties' resources;
  - importance of discovery in resolving the issues; and
  - whether the burden or expense outweighs its likely benefit.

Proportionality: Rule 26(b)(1)

- Note that there is an emphasis on the parties' "relative access" to information.
- "Information symmetry:" A plaintiff may have limited discoverable information while the other parties may have readily retrievable data.
- "[T]hese circumstances often mean that the burden of responding to discovery lies heavier on the party who has more information, *and properly so*."
- 2015 Committee Notes

Rule 26(b)(1)

- The scope of discovery has changed from:
  - "Relevant information need not be admissible . . . if the discovery appears reasonably calculated to lead to the discovery of admissible evidence" is gone.
  - Replaced with "Information within this scope of discovery need not be admissible in evidence to be discoverable."

Rule 26(b)(1) Committee Notes

- This amendment "restores the proportionality factors previously found in Rule 26(b)(2)(C)(iii) to their original place in defining the scope of discovery."
- It does not "change the existing responsibilities of the court and the parties to consider proportionality."

Case Law after 2015 amendment to Rule 26(b)(1), FRCP on Proportionality

- *McArthur v. The Rock Woodfired Pizza & Spirits*, 318 F.R.D. 136 (W.D. Wash. Dec. 1, 2016). *Document requests for company-wide financial information was not proportional in an employment case focusing upon personal work environment at one business location.* Court did not stop all corporate-level discovery related to an essential element of FLSA claim and whether defendant engaged in inter-state discovery.
- *O'Connor v. Uber Technologies, Inc.*, 2016 WL 107461 (N.D. Cal. *Jan. 11, 2016)* (wage and hour case), court found Uber's discovery requests for identities and communications of more than 17,000 putative class members "wildly overbroad" and the request failed to satisfy Rule 26(b)'s proportionality requirement.

Amount in Controversy

- *Milliner v. Mut. Sec., Inc.*, 2017 WL 1064978 (N.D. Cal. March 24, 2017). Breach of contract, misappropriation of trade secrets with damages between $100-$200 million. Discovery requests included source code, which defendants claimed were trade secrets. Court found the discovery request for source code proportional, considering the amount in controversy but plaintiff needed to work in good faith to narrow its discovery requests.
- *Nece v. Quicken Loans, Inc.*, 2018 WL 1072052 (M.D. Fla. Feb. 27, 2018). A request for 3 million emails was disproportionate at the class certification stage where damages were limited to $500 per violation.

Parties' Access to Information

- *Elkarwily v. Franciscan Health Systems*, 2016 U.S. Dist. Lexis 99795 (W.D. Wash. 2016). Plaintiff filed a motion to compel, seeking production of emails and texts. Defendant argued requests were unduly burdensome because not readily accessible, costly to restore and would be of minimal discovery value. Defendant met its burden because it had provided specific data regarding cost and time necessary to retrieve, review, and restore each tape for a total cost of $157,500. Court held defendant should allow plaintiff access to archived emails if plaintiff bore costs.

Undue Burden and Expense

- A responding party may object to a discovery request or subpoena based upon undue burden. But respondent must explain the cost and time to collect, process, search for, and review requested information.

State Farm Mut. Auto. Ins. Co. v. Pointe Physical Therapy, LLC, 255 F. Supp. 3d 700, 705 (E.D. Mich. 2017), aff'd, 2017 WL 3116261 (E.D. Mich. July 21, 2017).

Don't Ignore the Entire Analysis Under Rule 26

- *Oxbow Carbon & Minerals LLC v. Union Pacific Railroad Company*, 322 F.R.D. 1 (D.D.C. 2017).
  - Antitrust lawsuit where defendant railroads requested documents from plaintiff Oxbow's CEO. Oxbow initially estimated the costs to review, and produce would be about $250,000.00. Oxbow did an initial sampling of the documents and found only 11% reviewed using TAR (technology-assisted review) were responsive. Oxbow produced the sampling but refused to review the remaining documents.
  - Oxbow cited only the burden and costs of the proposed review. The Court considered all factors and found that the cost of reviewing the remaining documents (about $142,000) alone would not render a complete review unnecessary, especially in light of the fact that Oxbow had already sent $1.391 MILLION reviewing and producing the other documents.
  - In other words, production being too expensive or too burdensome is no longer enough. You must explain why discovery is not needed in or is not proportional to your case.

Marginally Relevant is Not Enough

- *In re Bard IBC Filters Products Liability Litigation*, 317 F.R.D. 562 (D. Ariz. September 16, 2016). Defendant didn't need to search ESI for communications between foreign subsidiaries and divisions of defendant because the court found the discovery only marginally relevant and more "hope than likelihood." The parties had a duty to consider proportionality.

Timing and Sequence of Discovery Rule 26(d), FRCP

- A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f).
- Early discovery under Rule 34 may be sent more than 21 days after the summons and complaint are served to the party by any other party, and by that party to any plaintiff or any other party that has been served.
- Early discovery is considered *served* based upon the first day of the Rule 26(f) conference.
- Discovery by one party does not require another party to delay discovery.

Rules 30, 31, 33 and 36, FRCP

- The controversial proposed amendments, which would have imposed numerical limits and would have reduced depositions from 10 to 5; length of depositions from 7 to 6 hours; number of interrogatories from 25 to 15 and number of RFAs from no limit to 25, were withdrawn.

Rules 30, 31, 33 and 36, FRCP

- Instead, the Committee amended to incorporate emphasis on proportionality and withdrew the proposed amendments to encourage efficiency and cooperation through early case management.
- "[W]e believe a too-low presumptive limit will result in more contested applications to exceed the limit and generate more collateral litigation rather than less—a risk that may be exacerbated by the fact that these larger cases are frequently the most intensely contested."

Don Bivens, Section of Litigation of the American Bar Association, to Hon. David G. Campbell, Chair, Standing Comm. on Rules of Practice and Procedure, and Hon. Jeffrey S. Sutton, Chair, Advisory Comm. on Civil Rules (Feb. 3, 2014).

Obligations, Objections, Rolling Productions: Rule 34, FRCP

What is Discoverable?

- "Any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form." Fed.R.Civ.P. 34(a)(1).

Amendments Rule 34(b)

- Rule 34(b)(2)(B) Responding to Each Item. For each item or category, the response must either state that inspection and related activities will be permitted as requested or state with specificity the grounds for objecting to the request, including the reasons. The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.

- Rule 34(b)(2)(C) Objections. An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest.

Rule 34(b) RFPs can be served before the Rule 26(f) Conference

- No earlier than 21 days after the receiving party was served in litigation.
- Deemed served at the first Rule 26(f) Conference.

Why Serve Rule 34 Requests Before the Rule 26(f) Conference?

Pros	Cons
May facilitate a more productive Rule 26(f) Conference.	No requirement to respond before the Rule 26(f) Conference; so it may reveal propounding party's strategy.
May assist with determining the breadth and depth of discovery, including the types of ESI involved in the case.	Gives the responding party additional time to formulate objections and arguments against producing the documents.
May assist the parties with determining the scope of litigation holds.	Rule 34, regardless of whether the Requests are served early, will require the parties to think early and extensively about the ESI to be produced.

Responding to Discovery under Rule 34, FRCP: Committee Notes

- Objections must "state *with specificity* the grounds for objecting" and "whether any responsive materials are being withheld.“
- An objection may state that a request is overbroad, but . . . should state the scope that is not overbroad.“

Rule 34(b)(2)(B), FRCP

- Modified rule includes a provision permitting the responding party to indicate production of materials or allow inspection.
- Responses must include a reasonable date for production.
- If a “rolling production,” the party must set forth the phases and give the start and end dates of the production.

Responding to Discovery under Rule 34, FRCP: Committee Notes

- An objection that "states the limits that have controlled the search for responsive and relevant materials"—which might include the date range or the scope of sources or search terms used—"qualifies as a statement that the materials have been 'withheld.'"

Responding to Discovery under Rule 34, FRCP: Committee Notes

- “[p]roduction must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response."
- This new provision appears to limit the parties' ability to engage in unconstrained rolling productions.

Responses to Discovery: Don't Use Boilerplate

- Boilerplate Responses violate the specificity requirements of Rule 34, FRCP; Fisher v. Forrest, No. 1:2014cv01304, opinion dated February 28, 2017 (S.D.N.Y., 2017).
- The 2015 amendments deleted "likely to lead to the discovery of relevant, admissible evidence."
- This language and "overly broad and unduly burdensome" should be removed from every form.

Rule 34(b)(2)(C), FRCP

- The amendment to Rule 34(b)(2)(C) requires the response to indicate whether documents are being withheld on the basis of the stated objections.
- Eliminates uncertainty with numerous objections when the producing party still provides information.

Sanctions: Rule 37, FRCP

The 2015 Amendments to Rule 37, FRCP

- No new duty to preserve ESI
- Amended Rule 37 gives courts broad discretion to cure prejudice from loss of ESI.
- The rule changes to 37(e) are only applicable to ESI because "the law of spoliation of evidence other than ESI is well developed and long standing...."

June 2014 Rules Report at B-16.

Rule 37(a)(3)(B)(iv), FRCP

- A party may move for an order compelling disclosure or discovery if:
  - a party fails to produce documents or fails to respond that inspection will be permitted -- or fails to permit inspection – as requested under Rule 34.
- Former version specified that a motion to compel is appropriate where party fails to respond that inspection will be permitted or fails to permit inspection.

Rule 37(e), FRCP
Failure to Preserve ESI

- 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:

(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

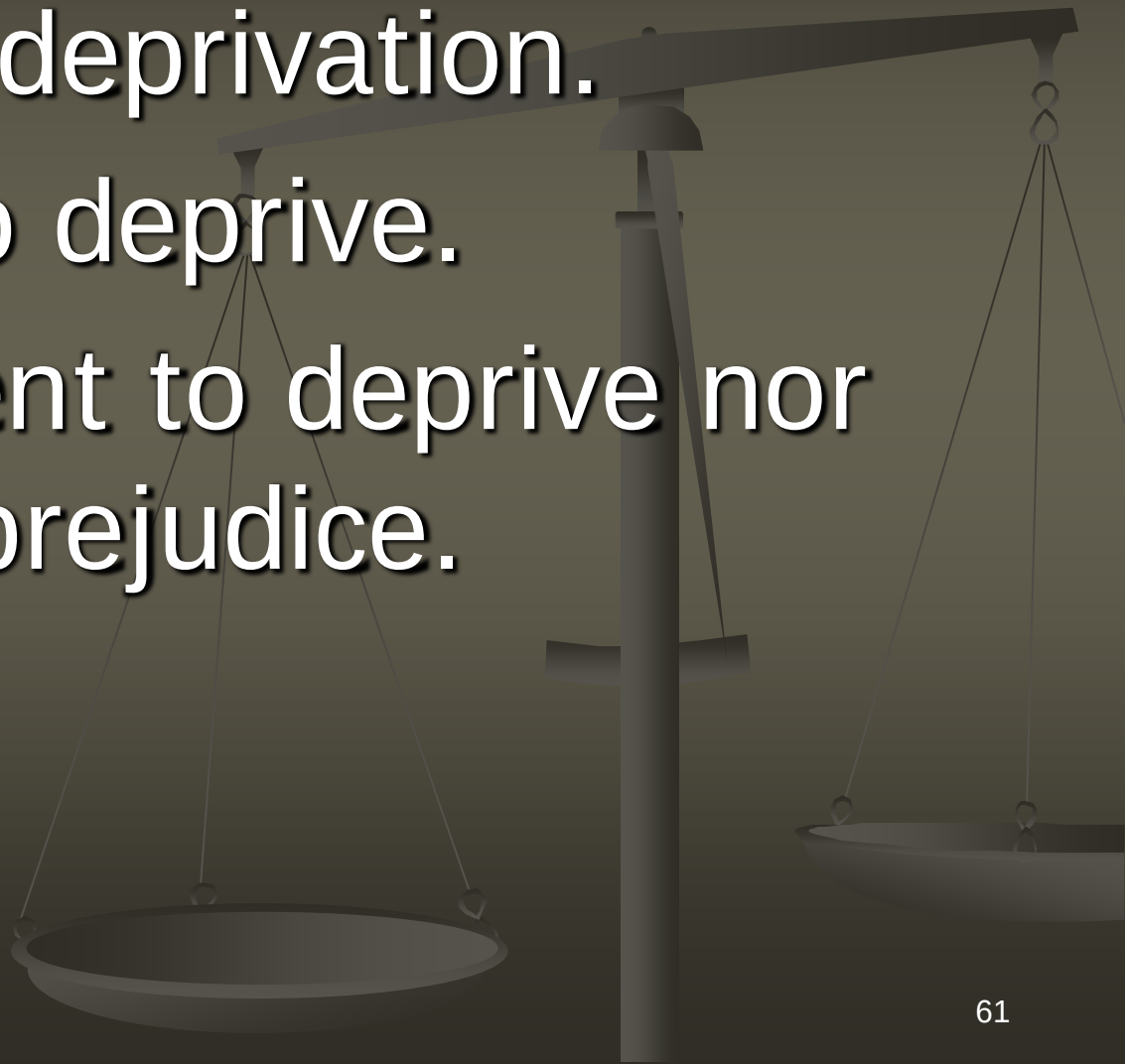
(C) dismiss the action or enter a default judgment.

FRCP Rule 37(e) Committee Note

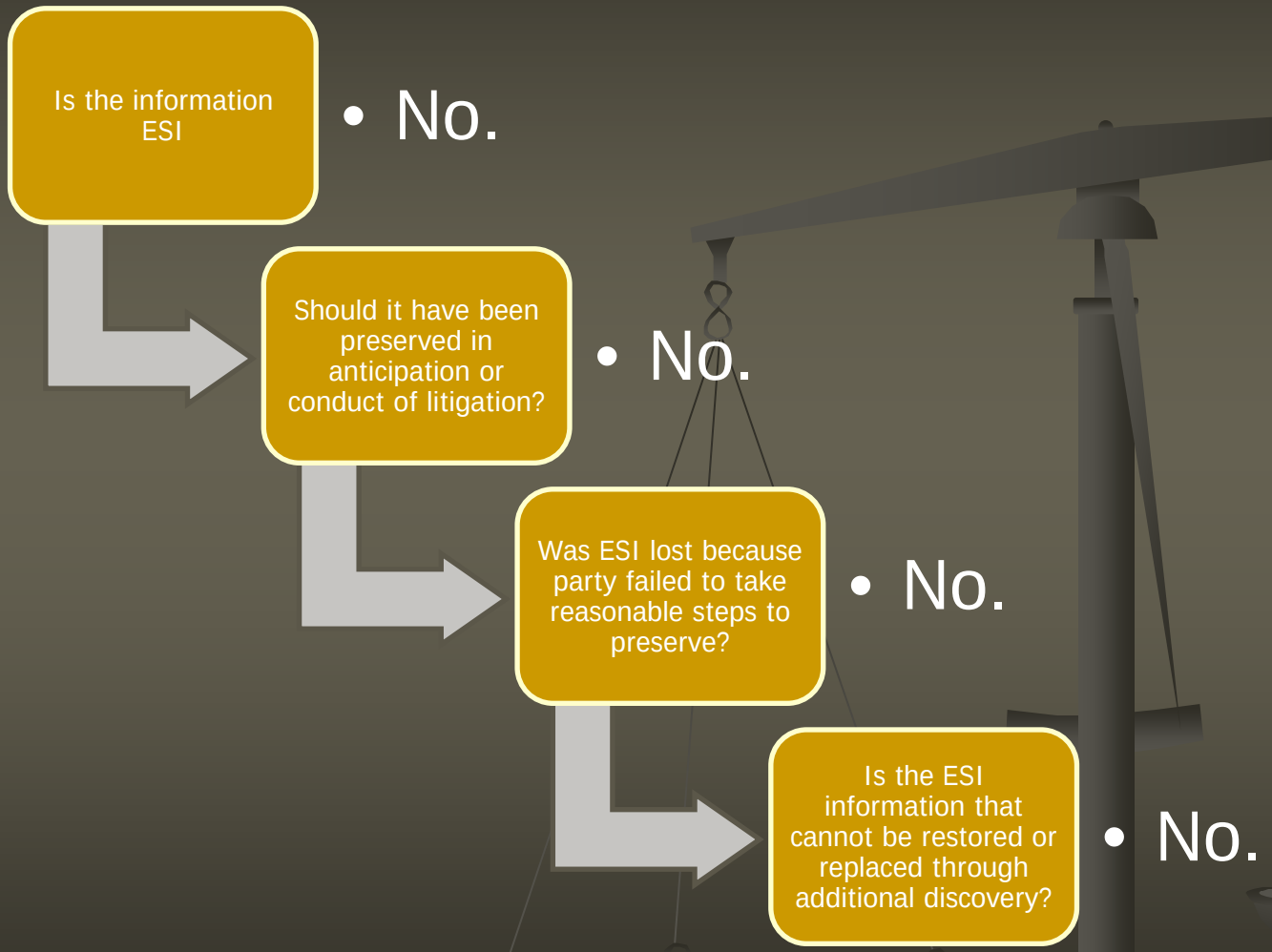
- It was a limited rule that did not adequately address serious problems from the exponential growth in information.
- Federal circuits had different standards and there was no uniform approach.
- Preservations orders, therefore, became expensive to avoid the risk of severe sanctions.

Three General Categories

- Intentional deprivation.
- No intent to deprive.
- Neither intent to deprive nor significant prejudice.



Threshold Factors



If all four answers are no, then no basis for sanctions under Rule 37

Rule 37(e)(1), FRCP

- If reasonable steps are not taken and ESI is lost and it cannot be restored or replaced, then:
  - There must be a finding of prejudice;
  - Measures imposed must be no greater than necessary to cure the prejudice; and
  - The court may not impose the severe measures provided in 37(e)(2).

Rule 37(e)(1), FRCP

- Fast v GoDaddy.com LLC, ___ F.R.D. ___, 2022 WL 325708 (D. Ariz. Feb. 3, 2022):
  - Judge David Campbell imposed sanctions against Plaintiff under Rule 37(e)(1), after she failed to take steps to back up her phone in the cloud.
  - Judge Campbell found Plaintiff made repeated representations regarding her technical skills and had the sophistication necessary to properly back up her iPhone.

Rule 37(e)(2), FRCP

- The more severe sanctions under Rule 37(e)(2) are limited to when a party "acted with intent to deprive another party of the information's use in the litigation."
- Those sanctions are:
  - The court may presume lost information was unfavorable to the party;
  - Instructing the jury that it may or must presume the information lost was unfavorable to the party that failed to preserve;
  - Dismissing the action or entering a default judgment.

Sanctions: Failure to Preserve

Nuvasive, Inc. v. Madsen, Inc., No. 13cv2007, 2016 WL 305096 (S.D. Cal. Jan. 26, 2016).

- Nuvasive failed to prevent the destruction of text messages requested by Defendants.
- Under the new Rule 37(e), Fed.R.Civ.P., Plaintiff stated the Motion for Sanctions should be argued under the new rule, which requires intent to harm.
- The Court agreed and found Plaintiff at fault but did not find that it had intentionally failed to preserve text messages. Absent intent, the Court could not impose an adverse inference.
- The Court allowed the parties to present evidence to the jury regarding the loss of ESI and instructed the jury that it may consider such evidence.

Sanctions: Failure to Preserve Emails

- Envy Hawaii LLC v. Volvo Car USA LLC, No. CV 17-00040 HG-RT, 2019 WL 1292288 (D. Haw. Mar. 20, 2019)
- Defendant Volvo sought financial and accounting information from Envy Hawaii LLC and emails from its employees. But Volvo could not demonstrate that the ESI was irretrievable.
- Motion for Sanctions was denied and Volvo was allowed to issue subpoenas to obtain records from CDK and Google.

Sanctions: Failure to Preserve Text Messages

- Waymo LLC v. Uber Techs., Inc., No. C 17-00939 WHA, 2018 WL 646701 (N.D. Cal. Jan. 30, 2018).
  - Uber attempted to minimize its paper trail by using "ephemeral" messaging (like Snapchat, Slack, WhatsApp, Messenger—in other words, messages that do not remain on the sender's or receiver's device).
  - Court issued a series of jury instructions to address Uber's failure to preserve text messages and other discovery misconduct.

Sanctions: Deletion of Instant Messages

Franklin v. Howard Brown Health Ctr., No. 17 C 8376, 2018 WL 4784668 (N.D. Ill. Oct. 4, 2018), report and recommendation adopted, No. 1:17 C 8376, 2018 WL 5831995 (N.D. Ill. Nov. 7, 2018)

- Workplace Discrimination and termination. During discovery Plaintiff sought Emails and text messages but DID NOT refer to instant messaging. And IMs were the primary source of harassment. They were destroyed as part of the regular and brief document management plan.
- Defendant failed to institute legal hold after trigger.
- Employees determined which data should be preserved
- Key employee computers wiped one week after lawsuit was promised.
- Sanctions may occur even without the intent to deprive.

Sanctions: Altering Emails

CAT3 LLC V. Black Lineage, Inc., 164 F.Supp.3d 488 (S.D.N.Y. Jan. 2016).

- Interpreting Rule 37, Fed.R.Civ.P., on a motion for sanctions as a result of plaintiffs altering emails in a trademark infringement case, the Magistrate Judge granted the Motion in part and barred the plaintiffs from using the altered versions of the emails at trial.
- The original ESI was lost and could not be adequately restored or replaced.
- Judge Francis declined to dismiss the case. Plaintiffs were precluded from relying on the subject emails, and were ordered to pay attorneys' fees and costs incurred by the defendants in establishing the spoliation and obtaining relief.

Sanctions: Plaintiff Altered Source Code

BMG Rights Management LLC v. Cox Communications, Inc., 199 F.Supp.3d 958, (E.D. Va. 2016).

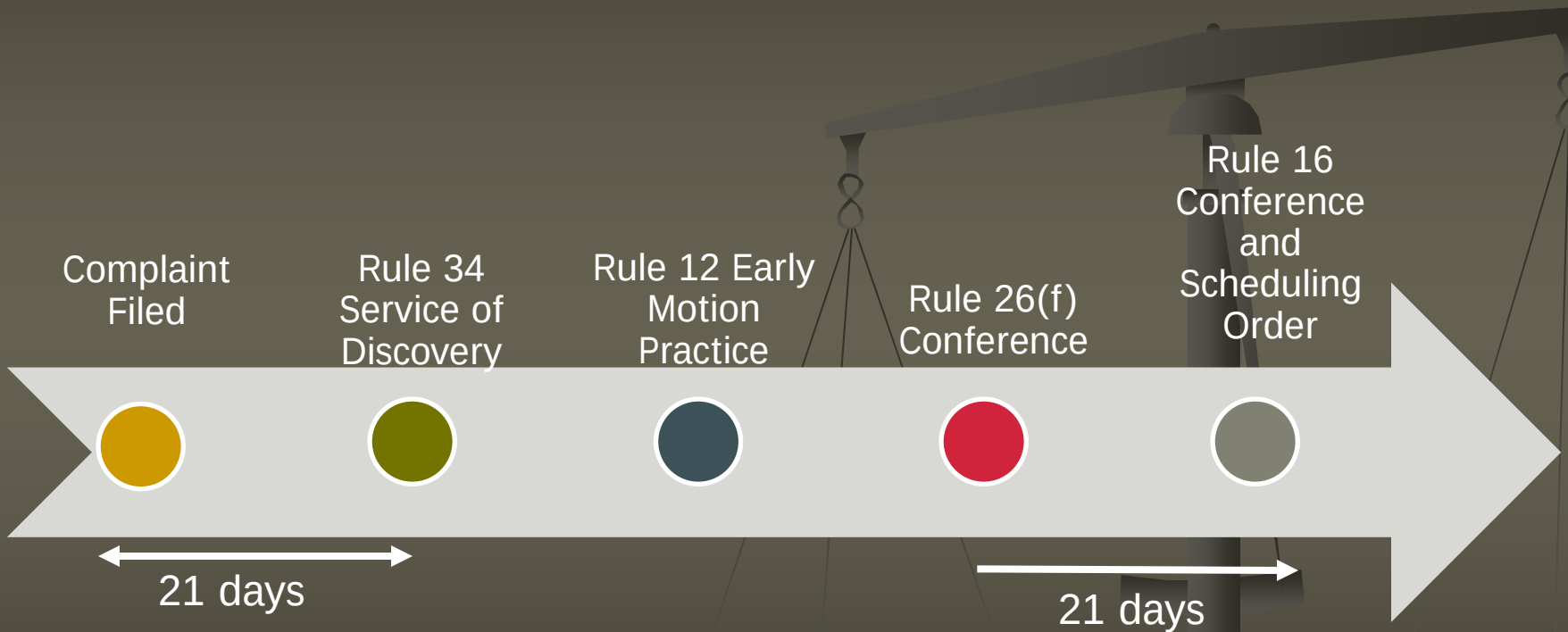
Plaintiff altered the source code of its system during the time of the dispute.

The Judge determined it was spoliation. The Judge granted sanctions, entered an order requiring that a permissive adverse inference instruction should be given to the jury, allowing but not requiring them to consider the absence of the earlier version of the source code.

Sanctions: Spoliation of Emails

- GN Netcom v. Plantronics, 2016 U.S. Dist. LEXIS 93299 (D. Del. July 12, 2016).
  - Defendant destroyed thousands of emails that could not be restored or replaced.
  - Judge Stark summarized key considerations for spoliation sanctions (degree of fault of party who altered/destroyed); degree of prejudice to opposing party and whether there was a lesser sanction to avoid substantial unfairness and if party was severely at fault, what would deter future conduct).
  - Court found intent and bad faith, issued monetary sanctions (fees); punitive sanctions ($3 million dollars); possible evidentiary sanctions; adverse inference.

Be Prepared to Move Quickly with New Rules Changes



90 days: Rule 4, must be served
90 days: Rule 16 Conference/Scheduling Order

Other Rules Changes

- FRCP 6(d): 2016 Amendment eliminates three days for "mailing" when service is made electronically.
- FRCP 4(m): Addressed above and amended in 2017. Clarifies that the 90-day time limit for serving process does not apply to notices of condemnation actions under FRCP 71.1(d)(3)(A).

Other Rules Changes

- FRCP 5: 2018 Amendments
  - FRCP 5(d)(1): Mandates electronic filing of materials, including complaints, by represented persons;
  - Pro se defendants may be permitted to use ECF by order or local rule;
  - Eliminating certificate of service for ECF filed materials;
  - 5(d)(3): An E-Signature requires an authorized filing through ecf account and it must match what is on file.

Other Rules Changes

- FRCP 23(b)(3), 2018 Amendment, governing class action cases: Notice can be given through electronic means or other appropriate means, which may even include text messages.

Rule 30(b)(6)

- Rule 30(b)(6) governs the deposition of an organization and requires, generally, that the notice of such a deposition set out with reasonable particularity the matters of examination.
- The amended Rule 30(b)(6)—which became effective on December 1, 2020—requires that, "[b]efore or promptly after the notice or subpoena is served, the serving party and the organization must confer in good faith about the matters for examination."
- The amendment also requires that a subpoena notify a nonparty organization of its duty to confer with the serving party and to designate each person who will testify.

Other Rules Changes

- FRCP 62 and 65, 2018 Amendment.
- Modernized language for replacement of the term, “supersedeas bond” under FRCP 62 and 65.1 with “bond or other security.”
- Automatic stay is extended from 14 to 30 days from the date of entry of judgment, to resolve the “apparent gap” between expiration of the stay and time for filing appeals.