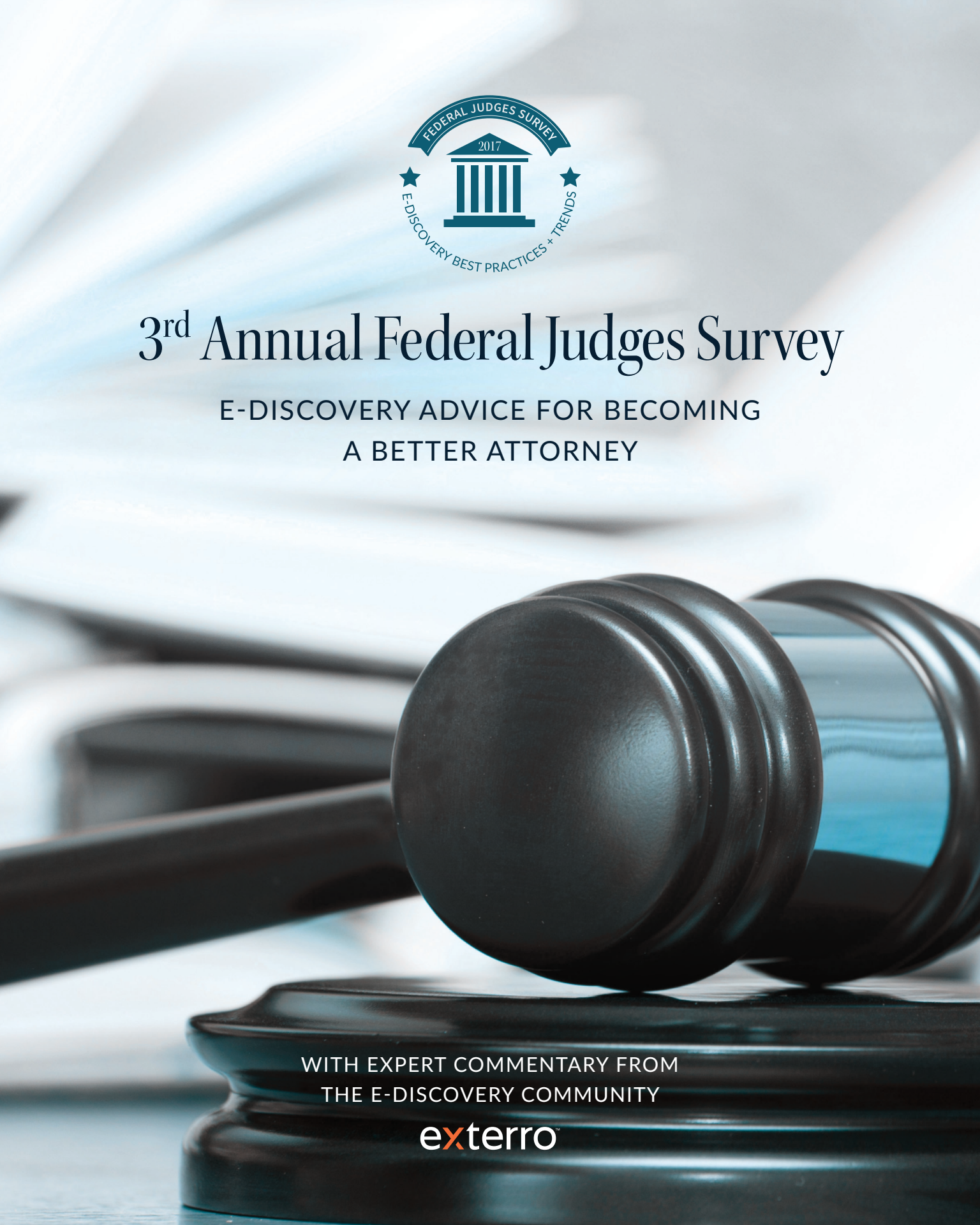


3rd Annual Federal Judges Survey

E-DISCOVERY ADVICE FOR BECOMING A BETTER ATTORNEY

WITH EXPERT COMMENTARY FROM
THE E-DISCOVERY COMMUNITY

exterro™

Introduction

EXTERRO CEO BOBBY BALACHANDRAN

In late 2014, much was being written about the proposed amendments to the Federal Rules of Civil Procedure (FRCP), with voices from various constituencies weighing in with opinions on what should be changed, and the predicted implications should those changes be enacted. Here at Exterro we observed one critical block of voices missing from all that analysis—those of our Federal Judiciary. Thus, we created a survey and published our *First Annual Federal Judges Survey on E-Discovery and Best Practices*.

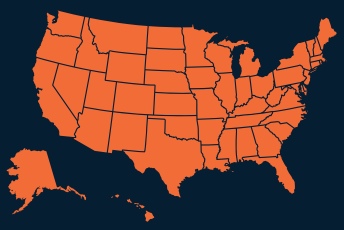
The next year we again surveyed Federal Judges for their opinions, but we added a wrinkle. *In last year's edition*, we also asked the same questions posed to the judges to leading attorneys who specialized in e-discovery for their opinions on the topics germane to their practice, including their predictions of the effectiveness of the new FRCP amendments, e-discovery competency, and emerging legal trends related to data and technology. Thus, each question revealed two different perspectives and included quotes from both sides, which provided a deeper analysis than what could be conveyed simply through the numbers. Interestingly, the judges and attorneys largely agreed, though there were some areas of contention.

As we prepared to administer this year's version of the annual survey, we wanted to once again add a new element to the data and provide even more value and insight one could glean from our work. I hope you will find the new format as refreshing as I have—instead of Exterro subject matter experts summarizing the data from the survey, we've asked noted industry luminaries to do so. Thus, in the following pages, you'll find commentary from renowned experts such as retired United States Magistrate Judges John Facciola and Frank Maas, UnitedHealth Group's Head of E-Discovery David Yerich, and Executive Director of ACEDS Mary Mack.

E-Discovery plays a vital (and growing) role in our legal process, and our intention with this survey is to both educate and help identify areas for improvement. I hope you enjoy reviewing our findings as much as we had in compiling them.

Bobby Balachandran
CEO, Exterro

Survey Highlights



22 FEDERAL JUDGES
FROM ACROSS THE US

E-DISCOVERY COMPETENCY
WHERE WE ARE NOW

For the third year in a row, judges do not feel the typical attorney has the required knowledge to be effectively counseling clients on e-discovery matters. However, the percentage of neutral votes has increased by 29% from 2016. This coincides with the result that judges are seeing e-discovery competency getting better compared to a year ago.

JUDICIAL ADVICE FOR IMPROVEMENT
COOPERATE AND LEVERAGE PROPORTIONALITY

This sentiment hasn't changed. Last year, 50% of judges thought Rule 26(f) conferences (i.e. meet & confers) were the easiest way to improve, with proportionality receiving the second most votes with 36%. To help parties approach proportionality and cooperation more effectively, judges suggest bringing alternative remedies (e.g. tiering or phasing e-discovery) to the court when making a proportionality argument and to communicate early with opposing counsel for identifying the primary points of contention.

FEEDBACK ON THE NEW FRCP RULES
1 YEAR AFTER IMPLEMENTATION

82% of the judges surveyed believe they have helped solve many current e-discovery problems. Most judges credit the Federal Rules Advisory Committee for giving legal teams new tools that enable them to be proactive and start developing reasonable e-discovery parameters earlier on in the case. If legal teams do take advantage of this, judges feel it will only help them get to the facts of the case sooner.

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Director of E-Discovery,
UnitedHealth Group

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Sr. Assistant Attorney,
City and County of Denver

Hon. John Facciola (Ret.)
United States Magistrate Judge,
District of Columbia

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With Expert Commentary from

Mary Mack, Esq.
Executive Director,
Association of Certified E-Discovery Specialists (ACEDS)

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the 3rd Annual Judges Survey

Report Findings

Metrics and Data are vital to understanding the state of any industry, but without the interpretation of that data, it's easy to get lost in all the charts, graphs, and percentages and not feel like you've come away with a clear understanding. That's why we've asked a group of e-discovery thought-leaders to provide commentary for this year's survey findings.

Please Note

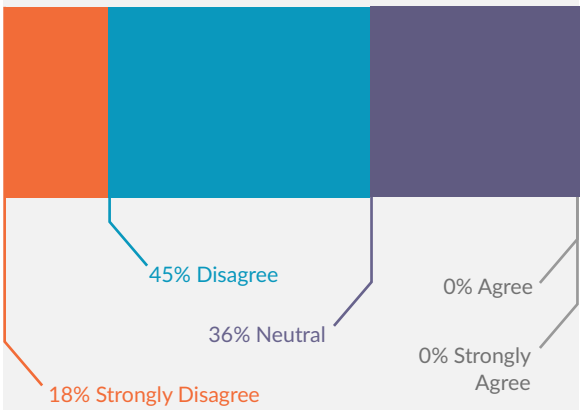
The subsequent commentary and positions written by these third-party e-discovery thought-leaders are just that—their commentary and positions—and do not necessarily reflect the positions and thoughts of the organizations they represent.

SECTION A.

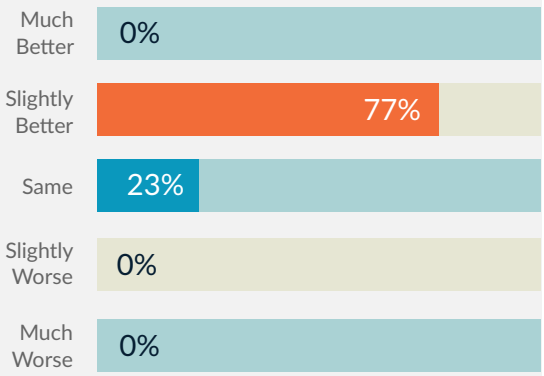
E-Discovery Competency
Where we are now

ATTORNEY E-DISCOVERY COMPETENCY

SURVEY QUESTION A1
The typical attorney possesses the subject matter knowledge (legal and technical) required to effectively counsel clients on e-discovery matters.



SURVEY QUESTION A2
How would you assess e-discovery competency today as compared to a year ago?



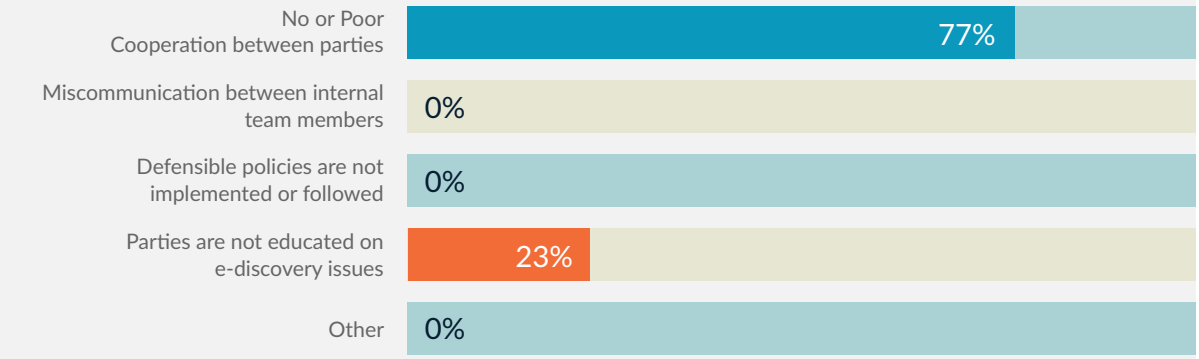
KEY TAKEAWAY

Judges do not feel the typical attorney has the required knowledge to effectively counsel clients on e-discovery matters. This perception has not changed within the three years of conducting this judges survey. However, the percentage of neutral votes has increased by 29% from 2016. This coincides with the result that judges are seeing e-discovery competency getting better compared to a year ago.

WHERE E-DISCOVERY PROBLEMS OCCUR

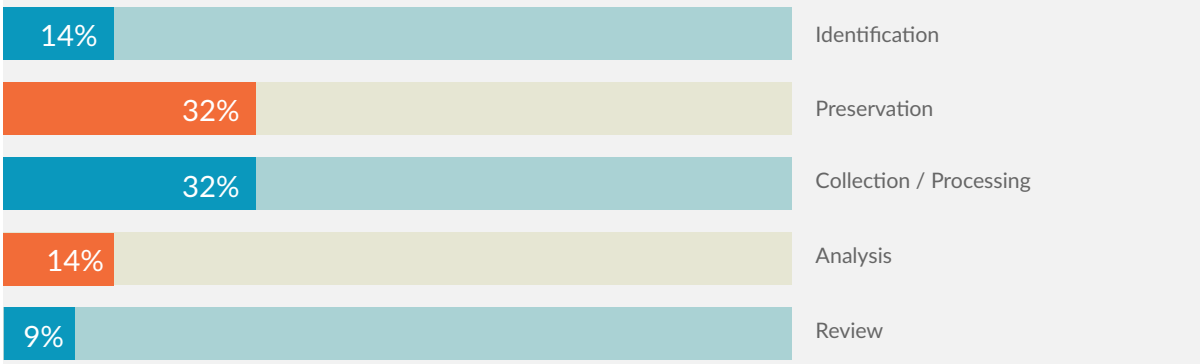
SURVEY QUESTION A3

Which of the following is the most frequent cause of e-discovery problems?



SURVEY QUESTION A4

The most common e-discovery mistakes occur in the _____ stage.



KEY TAKEAWAY

Cooperation. For judges this seems to be the key to solving most e-discovery problems that arise. A number of judges also felt that not being educated on e-discovery issues was an additional problem. One judge summed up the split in votes nicely by stating, "Lack of cooperation is the big problem in big cases. Lack of education is the big problem in small cases." Where does cooperation need to occur? Based on the survey results, cooperating within the early stages of e-discovery will have the most benefits.

2 DIFFERENT PERSPECTIVES
EXPERT COMMENTARY

Is Cooperation Between Parties the Key to E-Discovery Success?

PERSPECTIVE ONE WITH DAVID YERICH

Cooperation is critical for life. It is how individuals overcome personal limits and underpins all human achievements. It is the bedrock of society, allowing individuals to work together for the betterment of each person. Strong and just societies benefit from the rule of law to resolve disputes.

A legal system requires cooperation amongst adverse parties to properly function. The process of fact finding, known as discovery, is critical to any fair outcome in applying the law. Discovery of electronic information, a recent evolution in fact finding, has increased participants' costs so much as to erode the societal value for parts of the legal system. For economically grounded disputes, where the costs to defend or pursue a dispute exceeds the value of what is being contested, the justness of the outcome is in question. An excellent opportunity for reducing discovery costs, and helping preserve the current legal system as the platform to resolve disputes, is for the parties to work in a cooperative manner to help ensure the discovery costs are proportional to the dispute.

While adverse parties may strongly disagree about value of the dispute itself, whatever the value, cooperation that helps ensure that discovery costs are as low as possible also helps to ensure costs are proportional. A requirement for effective cooperation is for the participants to be genuinely educated in e-discovery processes, as well as the potential value of that information to the dispute. Uneducated practitioners who take aggressive positions in discovery disputes typically raise the costs for all parties. This works against the overall interests of their clients, the legal system, and ultimately society. Technology is evolving to lower the costs of discovering electronic information, but these savings are currently being offset by the ever-increasing volumes of information. Until the day comes that technology renders these costs moot, a great course of action is to cooperate by becoming educated about electronic discovery.

David Yerich, Esq.
Director of E-Discovery,
UnitedHealth Group

BIO

David oversees processes, protocols, and tools that the company utilizes in its electronic discovery production in regulatory and legal matters. One of the nation's leading experts in discovery, he previously worked as the Electronic Discovery Consultant at Faegre & Benson, a large Minneapolis law firm, and for ten years at the large international company, Cargill, where his work focused on document and electronic records management, e-discovery strategies, and document productions.

Geoffrey Klingsporn, Esq.
Sr. Assistant Attorney, City and County of Denver

BIO

Geoffrey C. Klingsporn is a Senior Assistant City Attorney at the City and County of Denver, where he represents Denver in civil litigation and appeals. He was the lead attorney in charge of Denver's recent implementation of Exterro.

PERSPECTIVE TWO WITH GEOFFREY KLINGSPORN

Whether or not it is the key to success, there's no doubt that cooperation in e-discovery is mandatory. Cooperation is required under the Federal Rules, essential to fulfill attorneys' obligations to clients and tribunals, and necessary simply to do the job. Discovery rules mandate discussion and agreement on at least the basics: what data will be searched, how it will be searched, and the format in which results will be transmitted. Even the most old-school, obstreperous, or aggressively analog counsel must concede as much.

The rise of "proportionality" as a governing principle of discovery only heightens the importance of cooperation. Judges do not wish to decide what is "proportional" in a specific case any more than they care to resolve any other kind of discovery dispute, and so place that burden on the parties in the first instance, to cooperatively discuss and agree on proportionality early and often.

But "competency" is a more difficult and ambiguous area in discovery practice—particularly in regards to cooperation. For example, an attorney must be competent enough to meaningfully discuss her client or employer's own ESI. But what is her duty when faced with opposing counsel not competent enough to fully understand her explanations? Does "cooperation" require her to educate her adversary? To what extent? And how far can she do so until the duty of cooperation comes into tension with her obligation to advance her client's interests?

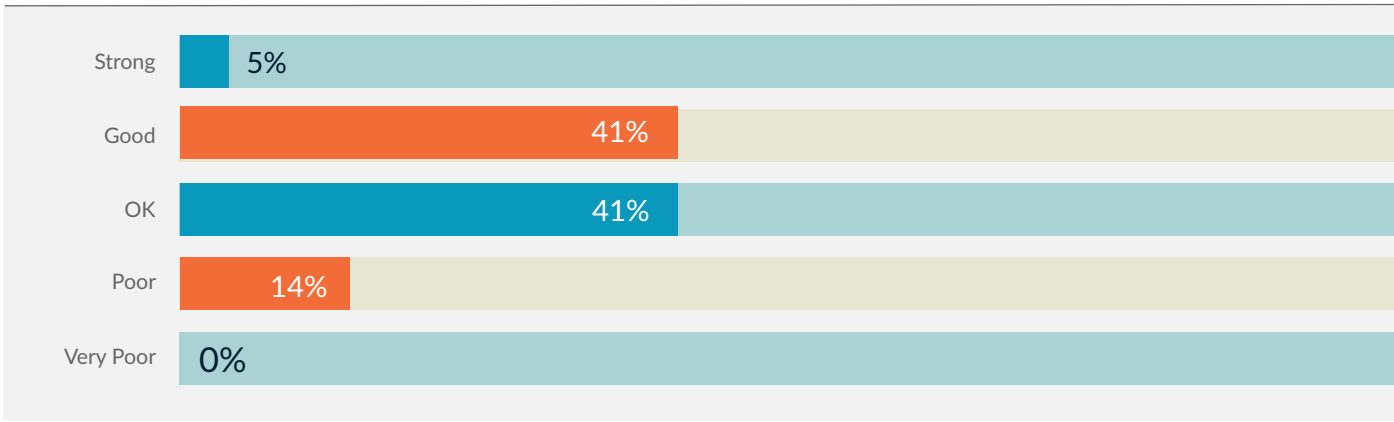
Every lawyer and judge knows that technical knowledge and e-discovery experience are not distributed evenly across the bar. On the contrary, in most cases competence will be asymmetric, and in such circumstances, it will not be sufficient for the court or the parties simply to invoke "cooperation" as a cure for all areas of disagreement. Effective cooperation requires mutual competence.

Fortunately, lawyers are well-trained and well-equipped to navigate gray areas. Varying circumstances will be met with specific solutions. The baseline of knowledge will rise as attorneys seek strategic advantage, or to cure disadvantage. In the end, the problem of asymmetric competence may itself be solved through cooperation, as attorneys learn from each case and from each other.

E-DISCOVERY COMPETENCY OF THE FEDERAL JUDICIARY

SURVEY QUESTION A5

How would you describe the general level of e-discovery competency among the federal judiciary?



EXPERT COMMENTARY

WITH HON. JOHN FACCIOLA (RET.)

The first generation of judges who confronted e-discovery faced challenges that were unique. There was not a word in their legal educations about the topic, the Federal Rules of Civil Procedure still spoke about "phonorecords," and "social media" had not yet been born. Indeed, their inventors had not been born. Whether they came from private practice or public service, these judges had probably used a word processor and might have been able to transmit electronically stored information over a phone line. That was the level of technological competence to which they could aspire. Judge Shira Scheindlin, who was to have a profound influence on the law and practice of electronic discovery, wrote an article asking whether the Federal Rules of Civil Procedure were up to the challenges and concluded that they were not. Her concern, shared by many other lawyers and judges, led to two sets of amendments of the Federal Rules of Civil Procedure that have transformed them as much as any amendments have ever done. Many judges participated in the creation of these new rules and have had to interpret them in their decisions.

The survey answer indicates that the judges are now equal to the challenges this new world created. That more than 80% of the respondents described the judges' competence as OK (40.91%) and good (40.91%) and the small number who rated that competence as poor (13.4%) is not merely good news; it is extraordinary. One wonders if any other profession, challenged as all are by technological change, would get the same grades from their consumers.

The consequences for counsel are obvious. They are facing a bench that knows what it is doing and appreciates how the technology can render the discovery process cheaper and more efficient. For example, counsel, either advancing or resisting a claim of burdensomeness, had better be ready to make a specific showing of how the technology works and how it supports her argument. The days of outlandish claims of costs, pulled from the sky, are over. The judge has heard those claims before and now has the technological competence to assess the technical validity of every claim and argument made.

This competence did not come without cost. Every e-discovery program for judges is over-subscribed and, as experience showed, cutting back on such programs is a false economy. This survey dealt only with federal judges, and their state colleagues have significant challenges since their time for training is as limited as their budgets. Counsel have an obvious obligation to try to make sure that the state court judges get the training from which the federal judges have so obviously benefitted.

Finally, counsel is now challenged to have the technological competence that is at least equal to the judges' competency. One wonders if the lawyers would get the same ratings as to their technical competence from their consumers. A technologically competent judge is going to insist that counsel have, at least, technological competence equal to their own. The necessity for counsel's availing herself of opportunities to improve that competence is obvious as the next generation of judges and lawyers enters the world of autonomous cars and the Internet of Things with the prediction that some 50 billion devices will be on the Internet by 2020.

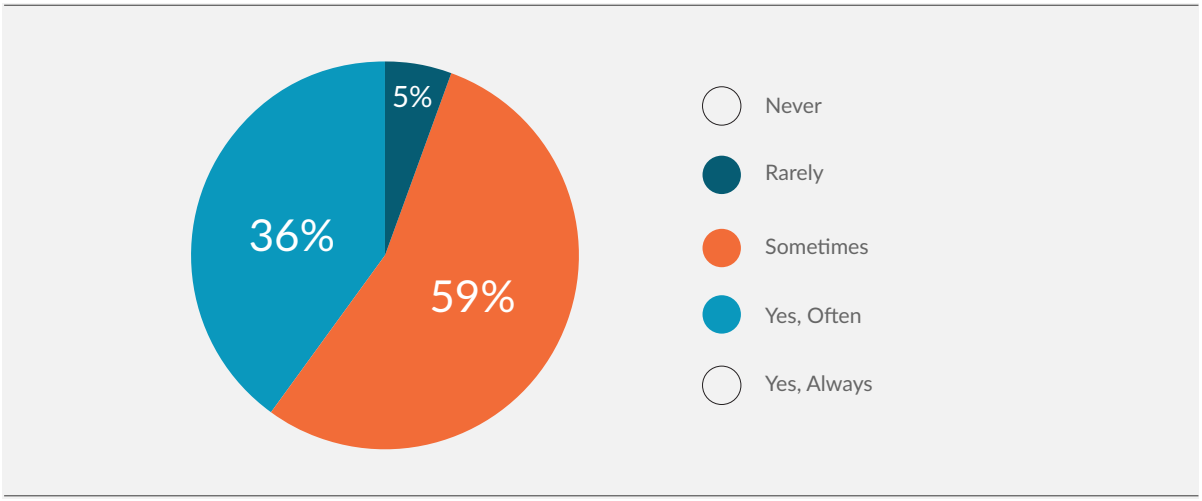
Hon. John Facciola (Ret.)
United States Magistrate Judge, District of Columbia

BIO

John M. Facciola was appointed a United States Magistrate Judge in the District of Columbia in 1997. Judge Facciola is a frequent lecturer and speaker on the topic of electronic discovery. Judge Facciola is a member of the Georgetown Advanced E-Discovery Institute Advisory Board and the Sedona Conference awarded him its Lifetime Achievement Award. He is also the former Editor-in-Chief of The Federal Courts Law Review, the electronic law journal of the Federal Magistrate Judges Association.

SURVEY QUESTION A6

Generally, do you think judges do a good job holding parties accountable for e-discovery mistakes?



EXPERT COMMENTARY

WITH HON. JOHN FACCIOLA (RET.)

As this response suggests, it is a consistent complaint of the bar that judges do not sanction lawyers' misbehavior in the discovery process. The complaint is a fair one in the sense that, with narrow exceptions, the grant of the power to sanction does not create automatic penalties but cabins that power by strict rules such as denying the sanction when the loser's position was substantially justified. The power to sanction is highly discretionary, and appellate courts, with a different perspective, may find that the imposition of a given sanction abused that discretion. In some Circuits, for example, the misbehavior must be egregious and be proven by clear and convincing evidence. Confronted with such an appellate regime, district court and magistrate judges may have to conclude that the offending misbehavior does not reach that level, particularly when it is based on a mistake concerning a technology that is new and complicated.

By the same token, the time may have come for the federal judges to be less forgiving. It is clear, for example, that an effective and useful meet and confer is a function of the preparation for it. That preparation has to be based on a thorough and easily explained understanding of the client's computer systems. It should never happen that one party's counsel knows what she has and needs, and the other party's counsel is mystified by what she is hearing and offers nothing but a vague desire to "meet again and continue our discussions." In that situation, counsel is well-advised to document what has occurred and tell the judge the obvious-the new regime of efficiency and cooperation envisioned by the 2015 amendments to the Federal Rules of Civil Procedure cannot come into existence if only one of the lawyers knows what she is doing. To be blunt, the judge may have to conclude that the carrot of saving time and money by knowing what you are doing is not working with a willfully ignorant lawyer, and it may be time to reach for the stick.

SECTION B.

E-Discovery Advice for Becoming a Better Attorney

HOW TO IMPROVE YOUR E-DISCOVERY APPROACH

SURVEY QUESTION B1

Which of the following areas offers the greatest potential for improvement among counsel?

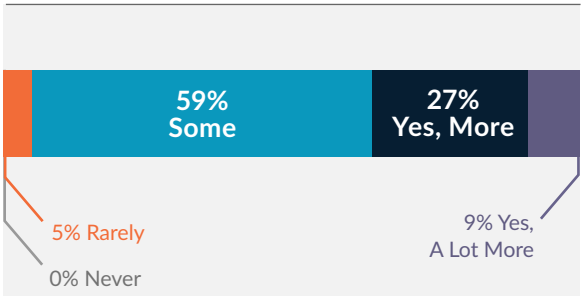
KEY TAKEAWAY

Coinciding with the cause of the biggest e-discovery problems, judges feel that applying cooperation and proportionality offers the greatest potential for improving. Last year, 50% of judges thought Rule 26(f) conferences were the easiest way to improve, with cooperation and proportionality receiving 36% compared to 77% this year.

REDUCE COSTS WITH PERSUASIVE PROPORTIONALITY ARGUMENTS

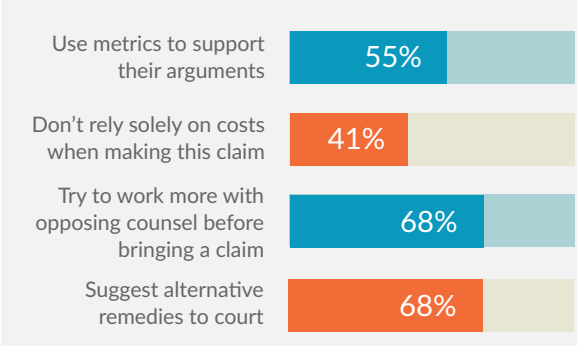
SURVEY QUESTION B2

With the new emphasis of proportionality under Rule 26(b)(1), are more parties making proportionality claims?



SURVEY QUESTION B3

When making proportionality arguments, what could parties do better? *(select all that apply)*



SURVEY QUESTION B4

What alternative remedies would you like to see parties try before making a proportionality claim?

SELECTED RESPONSES

"The use of sampling would be helpful before resisting discovery on proportionality grounds."

"Try producing a negotiated subset of important and relatively less difficult/expensive to obtain information that is reasonably without prejudice to considering further production if not sufficient."

"Open discussion about what is critical to the claim or defense and focus on the most efficient way to get that information and then discuss settlement."

"Always attempt to work it out by means other than exchanging e-mails."

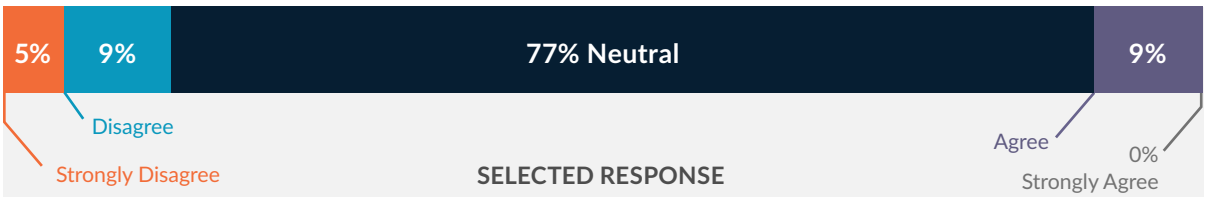
KEY TAKEAWAY

More judges are seeing parties make proportionality arguments, but that doesn't mean they are making good proportionality arguments. Instead many judges are seeing parties use boilerplate arguments (i.e. it costs too much). To help parties approach proportionality more effectively, judges suggest cooperating more and suggesting alternative remedies (e.g. tiering or phasing e-discovery) to the court when bringing this argument.

BE DEFENSIBLE WITH "REASONABLE STEPS"

SURVEY QUESTION B5

With the insertion of the "reasonable steps" to preserve language in Rule 37(e), have parties modified their approach to preservation?



SELECTED RESPONSE

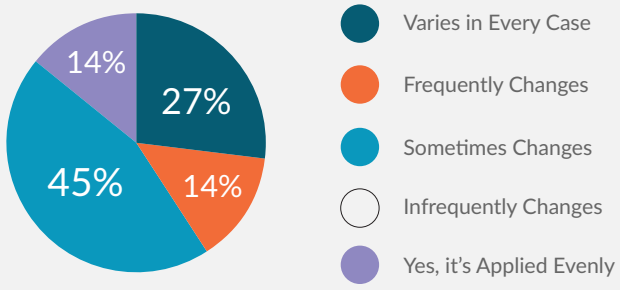
"Too soon to really tell, but I heard in-house counsel say so."

SURVEY QUESTION B6

Generally speaking, what should a party do to showcase "reasonable steps to preserve?" *(select all that apply)*

SURVEY QUESTION B7

Does the duty to preserve apply evenly across data sources (email, paper, social, mobile, etc.)?



SELECTED RESPONSE

"What is reasonable may vary across data sources, but the duty does not."

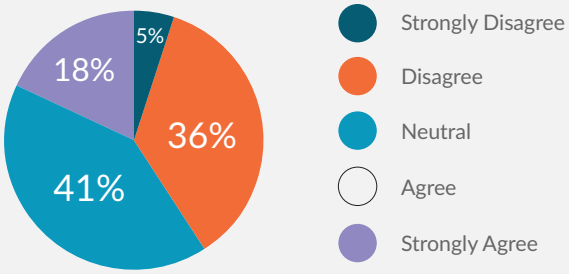
KEY TAKEAWAY

While the Rule 37(e) may have intended to give parties the blueprint for protecting themselves from ESI spoliation sanctions, it is still too soon to tell if parties are modifying their e-discovery processes based on it. Obviously depending on the circumstances surrounding the case, a couple of tips that may help ensure your e-discovery process is reasonable are: sending out a legal hold (86%), tracking and recoding all activities within the preservation process (77%), and suspending document retention policies. However, the court is still divided as to whether the duty to preserve applies evenly across all data sources (email, paper, social, mobile), leaving organizations to wonder if their e-discovery preservation approaches are adequate for new data types.

SPEED UP YOUR E-DISCOVERY TIMELINE

SURVEY QUESTION B8

Parties have taken advantage of the option to send Rule 34 requests in advance of the Rule 26(f) conference.



SELECTED RESPONSE

"Very few lawyers have noticed this."

KEY TAKEAWAY

The Federal Rules Advisory Committee has given parties new tools to be proactive and start developing reasonable e-discovery parameters earlier on in the case. Based on these, parties have not taken advantage of one of the new tools to do this in Rule 34. By empowering parties to send their initial document requests to the opposing party before Rule 26(f) conferences, attorneys can actually leverage their first meet & confer meeting to discuss and identify mutually agreeable e-discovery terms. If parties do take advantage of this, it will only help get you to the facts of the case sooner.

EXPERT COMMENTARY

Does new Rule 37(e) give serial defendants a blueprint for never getting sanctioned for e-discovery misconduct gain?

WITH MARY MACK

Mary Mack, Esq.
Executive Director, Association of Certified E-Discovery Specialists (ACEDS)

Preserving broadly, producing narrowly, and ad hoc preservation are so 2006. With the 2015 amendments to FRCP 37(e), it is clear the pendulum is swinging the other way on both of these issues.

Preserving broadly was initially seen as a cost-effective risk-reduction measure. The popular method was to cast a wide net and to preserve by collection. That changed when the cost of servers, backups, and expanded scope in subsequent litigation was tallied. At conferences, in conversations, and occasional opinions, judges have been coming to terms with the expense of over-preservation. Only 60% of the judges surveyed by Exterro think that collection of key custodian data need be shown to demonstrate reasonable steps were taken to preserve. Only 70% now feel that suspending document retention policies should be done.

The 2006-style preservation was generally case specific, ad hoc, and poorly documented. Many organizations did not even have document retention policies. In 2017, a substantial number of jurists (65%) believe that a full blown repeatable process should be done, and a supermajority (78%) believe all preservation steps should be documented.

Much 2006-era judicial quill oil was spilled over whether legal holds were necessary or whether the absence of a written legal hold constituted gross negligence. In 2017, a whopping 87% believe a legal hold should be sent. Something that is sent is likely to be written.

So if you think the new amendments make it less likely legal holds and litigation readiness will be important, you have another think coming.

Documented, repeatable processes are the hallmark of litigation-ready, battle-tested organizations. What can a start-up, or an infrequent, unregulated party do to take advantage of the grace granted by passing the "reasonable steps to preserve" test?

The old fashioned legal hold coupled with collection of key custodians may be enough to meet the threshold in the first section of 37(e):

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....

As Eric Mandel demonstrates in his beautiful FRCP 37(e) flowchart*, the producing party that demonstrates reasonable steps to preserve in the face of data loss can tell the requesting party to "talk to the hand."

Without reasonable steps, a party may go down the slippery slope of discovery about discovery, into the caldron of prejudice and intent to deprive.

Or put another way, legal holds and documented processes are the seat belts and airbags of e-discovery. You may get into a life threatening crash, but you are much more likely to survive with those two safety steps in place.

BIO

Mary Mack is the Executive Director of ACEDS, bringing more than a decade of strong credibility and sound leadership within the e-discovery community. Frequently sought out by media for comment on industry issues, she has spoken at venues including Gartner Symposium, the American Bar Association International Law Committee, and others. Mary is the author of A Process of Illumination: The Practical Guide to Electronic Discovery, considered by many to be the first popular book on e-discovery and the co-editor of the treatise, eDiscovery for Corporate Counsel.

*http://www.indiciumlaw.com/mandel-37e-flow-chart

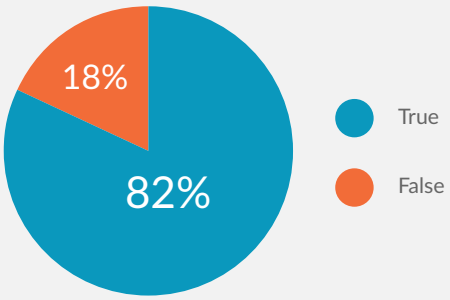
SECTION C.

General Thoughts on the New FRCP E-Discovery Rules

THE NEW RULES ARE WORKING, KIND OF ...

SURVEY QUESTION C1

The new FRCP e-discovery rules have helped solve many problems that currently occur in e-discovery today.



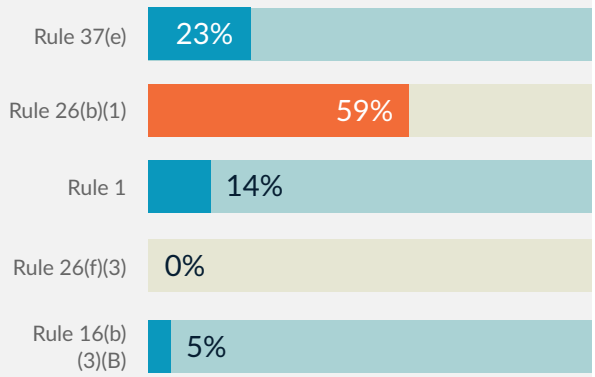
SELECTED RESPONSES

"The changes are a good start. Time will tell whether they have solved significant issues."

"I'm not sure the amendments have helped solve many problems, but the amendments are helping to flush out the issues earlier on."

SURVEY QUESTION C2

Which FRCP e-discovery amendment has had the biggest effect on e-discovery practices?



KEY TAKEAWAY

82% of the judges surveyed believe that the new FRCP rules have helped solve many current e-discovery problems. Even so, a lot of judges who felt this way still have some doubts. Most feel that these changes are a step in the right direction, but time will tell if they solve significant e-discovery issues. Compared to the 2016 Judges Survey, only 57% of judges felt that these amendments would help; taking that into account, the rules are overachieving in the judges' eyes.

As a whole, the rule that has had the biggest effect on e-discovery practices is overwhelmingly Rule 26(b)(1). This result contrasts the judges' expectations in 2016, which was split evenly between Rule 37(e) and Rule 26(b)(1) having the biggest effect on e-discovery practices.

EXPERT COMMENTARY

Are the new 2015 FRCP e-discovery rules effective in practice or are they just a lot of talk? And if not entirely effective, what can be done to improve?

Carolyn Southerland Esq.
Managing Director, Morae Legal

WITH CAROLYN SOUTHERLAND

While there has been much discussion in the e-discovery community regarding the impact of the 2015 civil rules amendments, there is little evidence by which to measure the true impact of the amendments on litigants and the courts in which they appear. With the third annual federal judges' survey, Exterro queried 22 prominent federal judges for their perspective on what works—and what doesn't—in the new amendments. As Chief Justice Roberts stated in his 2015 year-end report, "the 2015 civil rules amendments may not look like a big deal at first glance, but they are" (year-end report at p. 5). In fact, "the 2015 civil rules amendments provide a concrete opportunity for actually getting something done" (year-end report at p. 11). Did the amendments accomplish that goal?

The judges polled expressed optimism that the rule amendments "help to solve many problems" that occur in e-discovery today, with an 81% positive response rate. This is consistent with Chief Justice Roberts' statement in his 2015 year-end report that these amendments "mark significant change, for both lawyers and judges, in the future conduct of civil trials" (year-end report at p. 5), and rejects the notion that the amendments are nothing more than "technical, even persnickety" changes (year-end report at 4).

The judges polled are confident that the amendments have provided much-needed direction to litigants in areas that are often the subject of e-discovery disputes. For example, almost 60% of the judges surveyed say the amendments to Rule 26(b)(1), which bring the concept of proportionality to the fore, had the largest effect on e-discovery practices. Amended Rule 26(b)(1) provides:

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.

BIO

Carolyn Southerland is a graduate of the University of Houston Law Center and is a licensed attorney in Texas. She is a managing director at Morae Legal. She practiced litigation at one of Houston's largest firms, with a focus on e-discovery prior to moving into the world of e-discovery consulting. She is a frequent author and speaker on topics related to e-discovery and is a member of the Sedona Conference.

While the concept of proportionality existed in Rule 26 for some time in the former Rule 26(b)(2)(c)(iii), it has arguably been overshadowed by the "reasonably calculated to lead to the discovery of admissible evidence" language which was removed with the 2015 amendments. This language was often utilized to support requests for wide open, and expensive, discovery. The revised language "crystalizes the concept of reasonable limits on discovery through increased reliance on the common sense concept of proportionality" (year-end report at p. 6) and has, according to the survey, had the largest effect on e-discovery practices. Almost 60% of the judges surveyed recognized Rule 26(b)(1) as the most impactful of the amendments.

The amendments to Rule 37(e) came in a distant second with 23% of the judicial respondents identifying it at the most impactful amendment on practices. While proportionality is something that is certainly applicable to virtually all cases, the ever-present fear of sanctions is paramount among counsel and clients—with some observers saying that it is much overblown. From a litigant's perspective, the psychological impact of the addition of a specific framework requiring a finding of prejudice for imposition of "curative measures" as well as a required finding of "intent to deprive" for the more draconian of sanctions, such as an adverse inference instruction, cannot be overstated. Clients and their counsel have had to navigate a hodgepodge of different frameworks in various jurisdictions in dealing with preservation and potential sanctions for spoliation of evidence. The revisions to Rule 37(e) drive consistency, and likely curtail, the most severe sanctions. This, in turn fosters the need for consistency of process and approach to e-discovery by litigants. So, while the bench may not see the Rule 37(e) amendments as the most impactful on practices, query whether the same answer would be given by litigants.

The survey brought to light the perspective from the bench that the federal rules provide parties with sufficient clarity to proceed in matters. When asked what areas of the FRCP need more clarification, 50% of the judges replied that they viewed all areas of the FRCP as equally clear. A little over 30% of the judges identified production formats as an area needing further clarification in the rules. This may be due, in part, to vestiges of the paper world. After all, producing documents as they are "kept in the ordinary course of business" has little meaning when parties are dealing with electronically stored information. Instead, the focus for production of ESI should be production in a "reasonably useable form". But the determination of a "reasonably useable form" requires the parties to be willing to describe what they need, in fairly technical terms (such as specifications for a load file format). Most lawyers are not prepared to have such highly technical discussions. This may result in production of data in a format not "reasonably useable" by the other side, and the parties filing motions to compel.

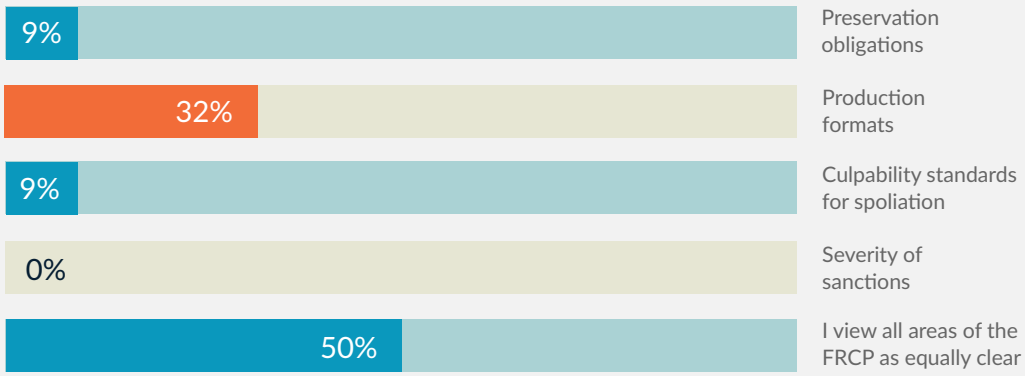
Fifty percent of the judges responding to the survey have adopted pre-motion conference requirements under Rule 16 in most or all of their cases, reflecting an effort by the courts to more actively manage discovery in cases before them. Query whether this is sustainable when most judges in federal courts experience seriously overcrowded dockets.

The results of the survey regarding the rules' amendments carry with them themes that litigants should keep in mind. First, the bench believes that the rules now provide adequate guidance to litigants on how to proceed with e-discovery in their case. Second, the changes in Rule 26(b)(1) are not simply ministerial, and parties would be well served to consider proportionality when making and responding to requests. Finally, courts will likely be more involved in managing discovery going forward, and will have little patience for parties who don't adhere to both the letter and the spirit of the rules as amended.

MORE CHANGES NEEDED TO THE FRCP?

SURVEY QUESTION C3

Which area of the FRCP relating to e-discovery do you think needs more clarification?



SELECTED RESPONSES

"Many issues remain—what does intent to deprive mean? How much circumstantial evidence is required to establish intent?"

"Specifically, does 37(e) provide all of the curative steps available for spoliation, or can the court rely on inherent authority?"

SURVEY QUESTION C4

If you had to choose, which FRCP rule would you prioritize amending next?

SELECTED RESPONSES

"None. I think we should let things settle down and see how these changes are absorbed and what effect they have before embarking on further changes."

"How can I choose? OK, Rule 26(c)(1). It should specify that a protective order with respect to a document subpoena may be sought in the district where the subpoena was served or the documents will be produced."

"Rule 23—to (a) add rules for opt-in class actions (e.g., FLSA collective actions); and (b) expressly deal with issues, such as arbitration clause issues, when they apply to some, but not all, of the class."

KEY TAKEAWAY

Most judges feel that the recent amendments have provided the needed clarification on e-discovery rules, which is enough for now. But the questions that did frequently arise revolved around Rule 37(e) and how to interpret the rule when it comes to actually issuing sanctions and how much discretion judges should be afforded when issuing e-discovery sanctions.

EXPERT COMMENTARY

How much discretion should judges be afforded when issuing e-discovery sanctions?

Hon. Frank Maas (Ret.)
United States Magistrate Judge, Southern District of New York

BIO

Frank Maas served for 17 years as a United States Magistrate Judge for the Southern District of New York, including a two-year term as Chief Magistrate Judge. Judge Maas is nationally known for his expertise in electronic discovery issues. He recently joined the New York Resolution Center of JAMS, Inc., where he serves as a mediator, arbitrator, special discovery master, and corporate monitor.

WITH HON. FRANK MAAS (RET.)

Federal trial judges have always had enormous discretion when it comes to pretrial electronic or paper discovery. Indeed, because discovery rulings are rarely reviewed on appeal, their determinations regarding sanctions are generally the last word. As the survey results reflect, the 2015 amendments to Rule 37(e) have not fundamentally changed this, nor should they have. Instead, judges must remain able to apply the discovery rules flexibly to achieve just results in cases whose facts frequently do not fit into neat cubbyholes.

Those who hoped (or feared) that the amendments to Rule 37(e) would lead to a sea-change in this respect are deluding themselves. Although the drafters of the current Rule 37(e) plainly sought to establish national standards regarding the ways in which courts would respond to allegations that electronic evidence had been spoliated, they also recognized that judges had to be afforded substantial discretion in deciding how to apply those uniform standards. Thus, neither subdivision (e)(1) of the Rule (relating to curative measures) nor subdivision (e)(2) (relating to potentially case-dispositive sanctions) requires a judge to take any specific action in response to a spoliation motion. Rather, both subdivisions state simply that the court may take certain steps if it wishes to do so. The ability not to act obviously is a powerful reaffirmation of a trial judge's substantial discretion in this area.

This is scarcely the only way in which the drafters of the revised Rule 37(e) acknowledged that trial judges must be afforded substantial discretion when ruling with respect to spoliation motions. For example, the drafters expressly declined to say who should bear the burden of establishing prejudice under subdivision (e)(1) of the Rule, explaining in the advisory committee notes that this lacuna was intentional and meant to vest judges with the "discretion to determine how best to assess prejudice in particular cases." The advisory committee notes to that subdivision similarly indicate that the language cautioning courts to impose "measures no greater than necessary to cure the prejudice" was intended to afford trial judges considerable discretion in deciding what remedies, if any, are appropriate.

The advisory committee's failure to rewrite another related provision of the Federal Rules also impliedly acknowledges the need for judges to have substantial discretion in this area. Specifically, notwithstanding the substantial 2015 amendments to Rule 37(e), Rule 37(b) continues to provide that the court where an action is pending "may" issue "just orders" when a party or witness fails to obey a discovery order—including, but not limited to, deeming

Continued on next page ...

facts established, prohibiting the disobedient party from supporting or opposing designated claims or defenses, striking pleadings in whole or in part, or even dismissing the action. As a consequence, when the spoliation of ESI also gives rise to a violation of a prior court order, a trial judge retains the discretion to impose significant sanctions without undertaking the analysis that would otherwise be mandated by Rule 37(e).

Finally, as one of my former colleagues, Magistrate Judge James C. Francis IV, maintains there are cases in which Rule 37(e) does not provide a basis for taking action against witnesses or parties, but their conduct is nevertheless so egregious as to undermine the integrity of the judicial process. Consider, for example, intentional spoliators who, in the memorable words of Judge Paul Grimm, cannot "spoliate straight." See Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 501 (D. Md. 2010). Although their actions may not actually result in the permanent loss of any ESI, federal judges arguably have the inherent authority—indeed, the duty—to address their misconduct, which might otherwise go unremediated under Rule 37(e). See James C. Francis IV & Eric P. Mandel, Limits on Limiting Inherent Authority: Rule 37(e) and the Power to Sanction ["Limits"], 17 The Sedona Conference J. 613, 652-56 (2016); see also Cat3, LLC v. Black Lineage, Inc., 164 F. Supp. 3d 488, 497-98 (S.D.N.Y. 2016) ("A party's falsification of evidence and attempted destruction of authentic, competing information threatens the integrity of judicial proceedings even if the authentic evidence is not successfully deleted").

To be sure, the advisory committee notes to the 2015 amendments state that the standards set forth in the new Rule 37(e) "foreclose reliance on inherent authority or state law to determine when certain measures should be used [against spoliators]." But, as Judge Francis and his coauthor note in their article, it is unclear whether the advisory committee intended to "proscribe reliance on inherent authority with respect to the entire arena of spoliation sanctions applicable to ESI." Limits at 644. Moreover, even if that was the goal, "there is a substantial question whether the Advisory Committee could effect such an outcome by means of a note." Id.

In sum, federal judges must be afforded substantial discretion to address misconduct involving ESI. Even though there are now national standards governing how the spoliation of ESI should be addressed, the application of those standards in particular cases remains a matter that requires trial judges to exercise their informed discretion. The new Rule 37(e) language does not change that, nor should it be interpreted as having done so.

Conclusion

To sum up, judges still feel the typical attorney doesn't have the required e-discovery competency, and that applying cooperation and proportionality offers the greatest potential for improving this. One example is that more parties are making proportionality arguments, but they aren't making good proportionality arguments. Again, cooperation and more education is key.

In regards to the FRCP changes that have now been in place for a little over a year now, 82% of the judges surveyed believe they have helped solve many current e-discovery problems. Rule 37(e) has given parties the blueprint for protecting themselves from ESI spoliation sanctions, but the rule is still being defined, especially when looking at new data types. This is why staying up on the latest case law rulings is important in order to see how the rules are interpreted by the court.

All in all, most judges feel that the recent amendments have provided the needed clarification on e-discovery rules, and that the Federal Rules Advisory Committee has given parties new tools to be proactive and start developing reasonable e-discovery parameters earlier on in the case. If parties do take advantage of this, it will only help attorneys get to the facts of the case sooner, which is the overall goal for everyone.

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