



Standing Committee Meets About the Proposed Amendment to the Federal Rule of Civil Procedure 37(e)

May 30, 2014

On May 29 and 30, 2014 the Standing Committee on Rules of Practice and Procedure is meeting and may approve the proposed changes to Fed. R. Civ. P. Rule 37 (e) made by the Advisory Committee. The Advisory Committee on Civil Rules announced in April, 2014 its proposed changes for the new rule 37 (e) and drafted a Committee Note on May 14, 2014 to accompany the revisions. These changes are proposed to streamline and specify the measures a court may take if electronic information that should have been preserved is lost. The supplemental Note addresses what findings must be made to justify such measures. This revision divides the rule into two subdivisions. Subsection one, 37(e) (1) addresses curative measures a court may take when it finds prejudice to another party from loss of the information, and the second subsection, 37(e) (2), offers more serious measures for when the court determines a party acted intentionally to deprive the other party of electronic information.

The Advisory Committee Note explains that the preamble language of the revision does not create a new duty to preserve. Rather, the duty to preserve information when litigation is foreseeable is still based on the common-law principles and the rule defers to the courts to determine whether and when a party's duty existed. The Note gives guidance to the courts by offering examples of how courts can address the duty. These examples will take the place of the previous rules controversial list of factors that were given to the courts to address the duty to preserve. Additionally, the new rule uses the language "reasonable steps to preserve the information" and the Advisory Committee Note states the reasonableness should be viewed in the light of the proportionality of the efforts. The Note advises courts to consider a party's resources and its routine operation of an electronic information system to decide if the party took "reasonable steps to preserve the information." However, the Note emphasizes that courts may consider that the party's knowledge of impending litigation may require additional preservation measures to be taken.

The proposed revision also divides the curative measures available between two subsections. If a court finds a party was prejudiced by another party's failure to take reasonable steps to preserve the electronically stored information, the proposed revision of Fed. R. Civ. P. 37(e) (1) allows the court to cure the prejudice. The measures available to the court are limited to the scope of solely curing the prejudice. The Advisory Committee Note leaves it to the court's discretion to assess the prejudice and does not put the burden on either of the parties.

The proposed revision (Fed. R. Civ. P. 37(e) (2)) requires the court to find that the party intentionally did not preserve the electronic information in order to dismiss the action or enter a default judgment. Separating these

sections creates a uniform standard for when courts can impose serious measures against the party in violation. The Advisory Committee Notes explains the element of intent dismisses the need to establish prejudice to the deprived party. The Committee's Note stresses that if a party willfully violates its duty to preserve, serious measures should be imposed against it even if there is no evidence of prejudice.

These proposed amendments can be adopted by the Standing Committee as early as May 30 at their meeting in Washington D.C. Please stay tuned to this blog for future developments regarding these proposed changes.

If you or your company has any questions or concerns regarding e-discovery related issue, contact James G. Ryan at jryan@cullenanddykman.com or via his direct line at 516-357-3750.

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