Electronic Discovery

by K. Alex Khoury*

At the end of 2015, the Federal Rules of Civil Procedure were amended to reform the discovery process with three main goals in mind: (1) promoting cooperation between the parties, (2) emphasizing proportionality in discovery, and (3) encouraging active case management by the courts. This Article will examine how the courts in the Eleventh Circuit interpreted and applied the new rules in 2016 and consider whether the new rules are having their desired effect on E-Discovery practice.[1]

I. COOPERATION

Federal Rule of Civil Procedure 1[2] was amended to promote cooperation by expressly stating that "the parties" are responsible for employing the Rules to obtain just, speedy, and inexpensive results in litigation.[3] Although the amendment did not create any new obligations on the parties, it was intended to encourage the parties to cooperate in furtherance of the goals of Rule 1. Attorneys versed in E-Discovery can attest to the tremendous savings in time and expense possible through cooperation, but if you asked ten attorneys to define "cooperation" in the context of E-Discovery, you would likely get ten different definitions. Rule 1 and its accompanying committee notes offer no guidance on how the parties are to cooperate.

The contours of E-Discovery cooperation may have been outlined by Chief Justice John Roberts in his *2015 Year-End Report on the Federal Judiciary* when he wrote, "The test for plaintiffs' and defendants' counsel alike is whether they will affirmatively search out cooperative solutions,

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1. For an analysis of electronic discovery law during the prior survey period, see K. Alex Khoury, *Electronic Discovery, Eleventh Circuit Survey*, 67 MERCER L. REV. 859 (2016).

2. FED. R. CIV. P. 1.

3. *See* FED. R. CIV. P. 1 advisory committee's note to 2015 amendment.

chart a cost-effective course of litigation, and assume shared responsibility with opposing counsel to achieve just results."[4] In 2016, federal courts began filling in details around Justice Roberts's outline, including several district courts in the Eleventh Circuit.

The United States District Court for the Middle District of Florida invoked Rule 1's implicit call for cooperation in *Lanard Toys Ltd. v. Dolgencorp, LLC*,[5] stating:

> Foremost, Rule 1 provides that the rules "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." The recent addition of "and the parties" places shared "responsibility to employ the rules in the same way." "Effective advocacy is consistent with—and indeed depends upon—cooperative and proportional use of procedure."[6]

The E-Discovery dispute in *Lanard Toys* arose, at least in part, because the parties failed to address E-Discovery concerns adequately in their Rule 26(f) [7] discovery plan. The parties' "plan" for discovery of electronically stored information (ESI) was to "work together in good faith to try to agree to a stipulated agreement regarding the disclosure and discovery of [ESI]."[8] The court aptly described the parties' agreement to agree as "too simplistic and too optimistic."[9]

Predictably, no agreement was reached before the parties began discovery. In response to the plaintiff's discovery requests, the defendant collected and produced documents in the manner and format of its choosing without metadata.[10] The plaintiff sought broader discovery, including the discovery of metadata, and moved the court to compel the defendant

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4. JOHN G. ROBERTS, JR., 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY 11 (2015), *reprinted in* STATE OF THE FEDERAL JUDICIARY: ANNUAL REPORTS OF THE CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES (Shelley L. Dowling ed., 2016) [hereinafter ANNUAL REPORTS], *available at* http://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf.

5. No. 3:15-cv-849-J-34PDB, 2016 WL 7031326 (M.D. Fla. Jan. 21, 2016).

6. *Id.* at *1 (quoting FED. R. CIV. P. 1; FED. R. CIV. P. 1 advisory committee's note to 2015 amendment).

7. FED. R. CIV. P. 26(f).

8. *Lanard Toys*, 2016 WL 7031326, at *4.

9. *Id.*

10. *See id.*; *see also* Defendants-Counterclaimants' Response in Opposition to Plaintiff-Counterdefendant's Motion to Compel Agreement Facilitating the Production of Electronically Stored Information, Lanyard Toys Ltd. v. Dolgencorp, LLC, No. 3:15-CV-849-34PDB, 2016 WL 7031326 (M.D. Fla. Jan. 21, 2016) (No. 3:15-CV-00849-MMH-PDB), 2016 WL 686687.

to agree to an ESI discovery plan or have plaintiff's proposed plan imposed on it.[11] The court denied the plaintiff's motion. One fact the court weighed in the defendant's favor was its offer to produce the metadata for any document it had already produced "upon the plaintiff's request and explanation for need."[12] The court's reasoning and ruling is an endorsement of Rule 1's call for a "cooperative and proportional use of procedure."[13]

Blake v. Batmasian[14] was a Fair Labor Standards Act (FLSA)[15] case that was derailed in discovery by the parties' and their counsels' "obvious mutual animus," which, the court noted, had "made the discovery process unnecessarily combative, excessively litigious, and wasteful of the Court's limited judicial resources."[16] After having already conducted three "lengthy discovery hearings" in the case, the court was forced to referee a dispute over the plaintiff's attempt to depose witnesses about alleged scandalous conduct by one of the defendants—allegations the court had already struck from the complaint as irrelevant to the case.[17] The court denied the plaintiff's request for additional time to depose witnesses on topics immaterial to the FLSA claim, citing, among other things, Rule 26's[18] proportionality requirement.[19] The court also emphasized cooperation, reminding the parties that Rule 1 "makes crystal clear the obligation of judges—and lawyers—to cooperate and control the expense of litigation."[20] The court warned the parties that it took the 2015 amendments to the Federal Rules of Civil Procedure seriously and expected them to do the same.[21]

In *Freedman v. Suntrust Banks, Inc.*,[22] the court was explicit that it expects parties to share information about their electronic information

11. 2016 WL 7031326, at *4.

12. *Id.* The offer to produce metadata only for specific documents upon a showing of need is a defensible compromise position for a party seeking to avoid producing metadata for all documents in its production. Rarely will all metadata for all documents produced be relevant to a case, and the additional burden of reviewing all of the metadata for relevance and privilege can be significant.

13. *Id.* at *1.

14. No. 15-cv-81222-MARRA/MATTHEWMAN, 2016 WL 4618931 (S.D. Fla. Sept. 2, 2016), *overruled on other grounds by* Blake v. Batmasian, No. 15-81222-CIV-MARRA/MATTHEWMAN, 2017 WL 657767 (S.D. Fla. Feb. 15, 2017).

15. 29 U.S.C. ch. 8 (2012 & Supp. II 2015).

16. 2016 WL 4618931, at *2.

17. *Id.*

18. FED. R. CIV. P. 26.

19. *Batmasian*, 2016 WL 4618931, at *6, 7, 8, 10, 11.

20. *Id.* at *3.

21. *Id.*

22. No. 6:15-cv-1657-Orl-41TBS, 2016 WL 3196464 (M.D. Fla. June 9, 2016).

systems early in cases to allow for efficient and economical discovery.[23] The plaintiff in *Freedman* was seeking to certify a class of credit applicants with disabilities, claiming the class had been discriminated against by the defendant.[24] The plaintiff sought discovery of loan files of potential class members but did not know the searching capabilities of the electronic information system the defendant used to store its loan files.[25] The defendant objected to reviewing all of its loan files to identify potential class members, claiming the process would be unduly burdensome.[26] The parties wasted several months of discovery while the plaintiff tried to figure out how to discover relevant information from the defendant's computers in a way that would be less burdensome for the defendant—apparently with little guidance from the defendant.[27] Although the court chided the plaintiff for her general lack of diligence in moving the case along, it reluctantly granted her motion to extend the deadline for class certification to allow more time for discovery because it found she acted "energetically," albeit ineffectively, in seeking discovery from the defendant's electronic information system.[28] The court encouraged parties to communicate earlier about E-Discovery and to get E-Discovery experts involved early if necessary to help parties learn about the capabilities of relevant electronic information systems.[29] The court observed that "[a] Rule 30(b)(6) deposition should not be necessary to obtain straightforward information about a party's electronic information systems."[30]

As these cases demonstrate, courts will look for, consider, and weigh parties' efforts to cooperate when deciding discovery motions under the Federal Rules as amended in 2015. The amendment to Rule 1 may not have officially created new obligations for parties, but, urged on by Chief Justice Roberts, courts are increasingly looking to Rule 1 to guide them in untangling E-Discovery disputes.

II. SCOPE OF DISCOVERY

One of the most talked about 2015 amendments was the overhaul of Rule 26(b)(1) to reemphasize the role of proportionality in discovery. By moving the proportionality factors from Rule 26(b)(2)(C) to Rule 26(b)(1), the Rules Committee did not change the scope of discovery so much as it

23. *Id.* at *5.
24. *Id.* at *1.
25. *Id.* at *3.
26. *Id.*
27. *See id.* at *4-5.
28. *Id.* at *6.
29. *Id.* at *5 (discussing FED. R. CIV. P. 30(b)(6)).
30. *Id.*

renewed the courts' and practitioners' focus on the use of the factors to limit discovery.[31]

An interesting, and perhaps unexpected, use of proportionality to limit discovery presented itself in *In re: Takata Airbag Products Liability Litigation*.[32] In that case, the parties disagreed over how to handle the production of irrelevant, confidential information that was comingled with discoverable data. The producing party requested that it be allowed to redact confidential, irrelevant information from documents containing relevant data and that it be allowed to withhold irrelevant parent documents from responsive document families.[33] The requesting party opposed the redactions, arguing that the parties had a confidentiality order in place to protect any commercially sensitive information contained in the documents and warned that allowing such redactions would lead to unnecessary litigation.[34] Following the recommendation of the case's special master, the court allowed the producing party to redact confidential, irrelevant information and to withhold irrelevant parent documents.[35] The court cited Rule 26(b)(1) proportionality and Chief Justice Roberts's Year-End Report[36] for the proposition that "a party is not entitled to receive every piece of relevant information."[37] "It is only logical, then," the court held, "that a party is similarly not entitled to receive every piece of irrelevant information in responsive documents if the producing party has a persuasive reason for why such information should be withheld."[38]

The fallout from the *Takata* decision bears watching. The court's ruling appears to devalue the protection afforded parties by confidentiality agreements, and this decision could lay the foundation for an increase in discovery disputes over redactions and the withholding of family documents in the name of relevancy.

III. FORM OF PRODUCTION

Mitchell v. Reliable Security, LLC[39] involved a dispute over the form of production of ESI.[40] The plaintiff asked the court to compel the defendant to produce documents in their native electronic format. According to

31. *See* FED. R. CIV. P. 26 (2010).
32. No. 15-2599-MD-MORENO, 2016 WL 1460143 (S.D. Fla. Mar. 1, 2016).
33. *Id.* at *1.
34. *In re: Takata*, 2016 WL 1460143, at *2.
35. *Id.*
36. ANNUAL REPORTS, *supra* note 4, at 6.
37. *In re: Takata*, 2016 WL 1460143, at *2.
38. *Id.*
39. No. 1:15-cv-03814-AJB, 2016 WL 3093040 (N.D. Ga. May 24, 2016).
40. *Id.* at *1.

the plaintiff, the emails and spreadsheets that would support her theory of the case were "susceptible to *post hoc* manipulation," which, she claimed, necessitated an examination of the documents' metadata.[41] The defendant asked to be allowed to produce documents in PDF format, claiming that the production of documents in native format would be more expensive and was not justified given the small amount in controversy. Neither party produced any evidence to support its claims. Operating in an evidentiary vacuum, the court ruled in favor of the plaintiff and compelled the defendant to produce ESI in native format.[42] The decisive factor in the plaintiff's favor was the defendant's failure to make "an adequate showing that production of native files is cost prohibitive."[43] The court found no reason to believe the defendants' ESI had been tampered with but held that the plaintiff's wish to verify no tampering had occurred was not unreasonable.[44]

The court's decision to compel the production of ESI in native format based on the mere potential for tampering is noteworthy. There are valid objections to producing ESI in its native format that were not raised in this case, however, which may limit *Mitchell*'s precedential value.

IV. COST-SHIFTING

In *United States ex rel., Victor E. Bibby, et al. v. Wells Fargo Bank, N.A.*,[45] the United States District Court for the Northern District of Georgia considered whether the cost of document review could be shared with an opposing party under Rule 26(c)(1).[46] The court previously entered a protective order requiring the plaintiffs to pay half of the costs arising from the discovery of certain defendant's mortgage loan files. When the defendant filed a motion for payment pursuant to that protective order, it included a demand for payment of half of the document review cost. The plaintiffs objected to the demand for review costs, arguing that such costs were excluded from the allocable expenses under Rule 26(c)(1).[47]

The court observed that the rule permitted courts to allocate expenses in protective orders but provided no guidance as to what constitutes an "expense."[48] After considering the split of authority from other jurisdictions on the question, the court held that "under limited circumstances,

41. *Id.* (emphasis in original).
42. *Id.* at *2.
43. *Id.*
44. *Id.*
45. No. 1:06-CV-0547-AT, 2016 WL 7365195 (N.D. Ga. May 26, 2016).
46. *Id.* at *1.
47. *Id.*
48. *Id.*

a party may seek to share reasonable costs related to reviewing documents prior to their production."[49] The court stressed that cost-sharing was appropriate under the "special circumstances" of the case and recited several factors the court weighed in its decision, including a discovery time period covering more than a decade, the significant discovery costs borne by the defendant that were not subject to the protective order's cost-sharing provision, and the court's belief that the cost shifting would not deter the plaintiffs or others from seeking to vindicate their rights.[50]

V. SPOLIATION

The courts' application of Rule 37(e),[51] which governs spoliation of ESI, was one of the most closely watched developments in E-Discovery in 2016. Four spoliation cases out of the Eleventh Circuit footprint garnered national attention.[52]

In *Living Color Enterprises, Inc. v. New Era Aquaculture, Ltd.*,[53] the plaintiff moved for sanctions against the defendant for knowingly deleting text messages relevant to the case.[54] The defendant admitted that the text messages in question had once existed and that he had deleted them.[55] According to the defendant, he routinely deleted text messages, and set his phone to automatically delete text messages after thirty days. The defendant admitted that he forgot to turn the auto-delete function off when the lawsuit began. In light of these facts, the plaintiff asked the court to strike the defendants pleadings and enter default judgment in plaintiff's favor.[56]

The court denied the plaintiff's motion for sanctions.[57] Walking through the steps of Rule 37(e) analysis, the court found (1) the spoliated ESI should have been preserved, (2) at least some of the ESI that should

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49. *Id.* at *2.

50. *Id.*

51. FED. R. CIV. P. 37(e).

52. Living Color Enterprises, Inc. v. New Era Aquaculture, Ltd., No. 14-cv-62216-MARRA/MATTHEWMAN, 2016 WL 1105297 (S.D. Fla. Mar. 22, 2016); Keim v. ADF Midatlantic, LLC, No. 12-CV-80577-MARRA/MATTHEWMAN, 2016 WL 7048835 (S.D. Fla. Dec. 5, 2016); O'Berry v. Turner, Nos. 7:15-CV-00064-HL, 7:15-CV-00075-HL, 2016 WL 1700403 (M.D. Ga. Apr. 27, 2016); Brown Jordan International, Inc. v. Carmicle, Nos. 0:14-CV-60629-ROSENBERG/BRANNON, 0:14-CV-61415-ROSENBERG/BRANNON, 2016 WL 815827 (S.D. Fla. Mar. 2, 2016).

53. No. 14-cv-62216-MARRA/MATTHEWMAN, 2016 WL 1105297 (S.D. Fla. Mar. 22, 2016).

54. *Id.* at *1.

55. *Id.* at *2.

56. *Id.*

57. *Id.* at *7.

have been preserved was lost,[58] and (3) the lost ESI could not be replaced through additional discovery.[59] All three of these questions having been answered in the affirmative, the court next considered whether the plaintiff had been prejudiced by the loss of the ESI.[60] The court found that the plaintiff had not been prejudiced by the lost text messages because most of the missing text messages had been recovered from a third party and because the plaintiff failed to explain a direct nexus between the missing messages and the allegations in the complaint.[61] Lastly, the court found no direct evidence of "intent to deprive" or bad faith, observing that "it is common practice amongst many cell phone users to delete text messages as they are received or soon thereafter. There is nothing nefarious about such a routine practice under the facts presented here."[62] Having found no prejudice or intent to deprive, the court held that neither curative measures nor sanctions could be imposed under Rule 37(e).[63]

Keim v. ADF Midatlantic, LLC[64] was a Telephone Consumer Protection Act (TCPA)[65] putative class action lawsuit in which the plaintiff claimed he received unsolicited text messages from the defendants.[66] The defendants moved for sanctions when they discovered that the plaintiff had failed to preserve text messages that the defendants claimed would show his consent to the allegedly unsolicited text messages.[67] As in *Living Color Enterprises*, the United States District Court for the Southern District of Florida walked through the steps of the Rule 37(e) spoliation analysis.[68] The court answered the first question of that analysis, whether the lost ESI should have been preserved, in the negative.[69] The plaintiff exchanged the lost text messages between February and March 2011, and he testified that he routinely deleted his text messages shortly after receiving them. The plaintiff also testified that he first anticipated filing the lawsuit in or around October 2011.[70] Finding no clear evidence

58. The harm from this factor was mitigated by the fact that the plaintiff had been able to obtain many of the lost text messages from a third party. *Id.* at *5.

59. *Id.* at *4-5.

60. *Id.* at *5.

61. *Id.*

62. *Id.* at *6.

63. *Id.*

64. No. 12-CV-80577-MARRA/MATTHEWMAN, 2016 WL 7048835 (S.D. Fla. Dec. 5, 2016).

65. 47 U.S.C. § 227 (2012).

66. *Keim*, 2016 WL 7048835, at *1.

67. *Id.*

68. *Id.* at *4-6.

69. *Id.* at *5.

70. *Id.* at *4.

on when the text messages were actually deleted, the court concluded that the text messages were most likely deleted before the plaintiff had a duty to preserve them, and thus, sanctions were not appropriate.[71]

The most surprising spoliation case in 2016, *O'Berry v. Turner*,[72] is an auto accident case in which the plaintiffs' car was hit by a tractor-trailer truck.[73] The plaintiffs' attorney sent a spoliation letter to the defendants' counsel requesting that they preserve the relevant driver logs and information about the truck. The trucking company's loss control manager testified that he printed the driver log and PeopleNet data relevant to the action and placed the printed copies in a manila folder, which was his standard practice in the event of an accident involving one of the company's trucks. The loss control manager stored the folder in a cabinet in his office, but during the course of the litigation, the manager packed the folder into a moving box in anticipation of moving his office to another building and then took a medical leave of absence. When he returned, the manager was unable to locate the folder containing the documents for this case. When he reached out to PeopleNet to try to recover the missing data, he was told that the data had already been deleted pursuant to PeopleNet's document retention policy.[74]

Applying Rule 37(e), the court found that the trucking company's practice of printing a copy of the missing ESI and putting it in a folder did not constitute reasonable steps to preserve the missing data.[75] The court then turned to the issue of sanctions.[76] The court held that the company's practice of printing a single copy of a document it had a duty to preserve was irresponsible.[77] The court concluded that the company's failure to preserve the documents went beyond negligence, stating, "Such irresponsible and shiftless behavior can only lead to one conclusion—that [the company] acted with the intent to deprive the Plaintiff of the use of this information at trial."[78] As a sanction, the court ordered that an adverse jury instruction would be given, requiring the jury to presume that the missing evidence was unfavorable to the defendants.[79]

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71. *Id.*

72. Nos. 7:15-CV-00064-HL, 7:15-CV-00075-HL, 2016 WL 1700403 (M.D. Ga. Apr. 27, 2016).

73. *Id.* at *1.

74. *Id.* at *1-2.

75. *Id.* at *3.

76. *Id.*

77. *Id.* at *4.

78. *Id.*

79. *Id.* at *5.

The United States District Court for the Southern District of Florida in *Brown Jordan International, Inc. v. Carmicle*[80] also imposed an adverse inference as a sanction for spoliation under Rule 37(e).[81] In this case, the defendant, after being terminated by his employer, used the "Find my iPhone" app to remotely lock his company laptop and render it useless.[82] He also remotely wiped his company-owned iPad and lost his personal iPad after he knew litigation was imminent.[83]

Analyzing the plaintiff's motion for sanctions under Rule 37(e), the court concluded that the defendant had failed to take reasonable steps to preserve ESI, resulting in the loss of relevant data.[84] The court also found that the defendant acted with intent to deprive the plaintiff of information related to the litigation.[85] The case was tried as a bench trial, and the court elected to presume that the lost information was unfavorable to the defendant as a sanction for spoliation.[86]

VI. CONCLUSION

As expected, the courts in the Eleventh Circuit grappled with a number of E-Discovery disputes in the first full year following the amendment of the Federal Rules. The take-aways from Year One under the 2015 Amendments to the Federal Rules are: (1) courts are taking seriously the commitment to cooperation; (2) the amendment to Rule 37(e) is not the insurmountable barrier to case-killing sanctions that some hoped, and some feared, it would be; and (3) the full impact of the proportionality factors remains to be determined.

80. Nos. 0:14-CV-60629-ROSENBERG/BRANNON, 0:14-CV-61415-ROSENBERG/BRANNON, 2016 WL 815827 (S.D. Fla. Mar. 2, 2016).

81. *Id.* at *2.

82. *Id.* at *4.

83. *Id.* at *33.

84. *Id.* at *37.

85. *Id.*

86. *Id.*