

PREPARING FOR FRCP CHANGES WITH ENCASE EDISCOVERY

On August 15, 2013, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States published for public comment a draft of proposed amendments to the Federal Rules of Civil Procedure (F.R.C.P.). The proposed amendments, which were adopted on December 1, 2015, represent one of the most significant changes to discovery since the 1993 amendments requiring initial disclosures.

The three primary goals for the changes are:

1. To limit the scope of discovery authorized by the Rules;
2. To encourage cooperation among counsel in conducting discovery; and
3. To standardize and lessen the risk of sanctions for spoliation

The two most significant changes involve F.R.C.P. Rules 26 and 37. The newly adopted **Rule 26(b)(1)** now require “proportional discovery” and restrict it to information relevant to the claims and defenses asserted by the parties.

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	Previous Rule	New Rule
F.R.C.P. 26(b)(1)	Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identify and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action.	Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense <u>and proportional to the needs of the case considering the amount in controversy, the importance of the issues at stake in the action, 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 benefits</u> [Emphasis added]
Primary Change	<ul style="list-style-type: none"> • Quite broad and far-ranging • Any information could potentially lead to relevant and admissible evidence • Growth of ESI could make discovery process burdensome and expensive 	<ul style="list-style-type: none"> • Narrows the scope of discovery • Information within this scope of discovery need not be admissible in evidence to be discoverable • Proposal limits discovery on the basis of both relevance and proportionality
How EnCase eDiscovery will help	<ul style="list-style-type: none"> • Gold standard for Identification, Collection, and Preservation of ESI • Ability to create better, faster case strategy decisions by understanding the scope of ESI and its relevancy to the case (no pre-indexing required, ability to conduct pre-collection analysis, and continuous case assessment) 	

The other significant change by the Committee concerns revisions to Rule 37(e) related to preservation and sanctions. The new rule will impose a uniform and higher standard for federal courts by requiring that the failure to preserve evidence was 1. willful or in bad faith and 2. that the loss of information caused substantial prejudice to the litigation. The amended rule is “designed to ensure that potential litigants who make reasonable efforts to satisfy their preservation responsibilities may do so with confidence that they will not be subjected to serious sanctions should information be lost despite those efforts.”

	Previous Rule	New Rule
FRCP 37(e)	Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.	(2) Factors to be considered in assessing a party's conduct. The court should consider all relevant factors in determining whether a party failed to preserve discoverable information that should have been preserved in the anticipation or conduct of litigation, and whether the failure was willful or in bad faith. The factors include: (A) the extent to which the party was on notice that litigation was likely and that the information would be discoverable; (B) the reasonableness of the party's efforts to preserve the information; (C) whether the party received a request to preserve information, whether the request was clear and reasonable, and whether the person who made it and the party consulted in good faith about the scope of preservation; (D) the proportionality of the preservation efforts to any anticipated or ongoing litigation; and (E) whether the party timely sought the court's guidance on any unresolved disputes about preserving discoverable information.
Primary Change	<ul style="list-style-type: none"> Rarely invoked to provide the intended safe harbor 	<ul style="list-style-type: none"> Concept of reasonableness to consider the entire scope of a party's preservation efforts Protection against inappropriate sanctions for the failure to produce; and avoid burdensome and expensive 'over-preservation' New options the court will consider before imposing sanctions, including: permitting additional discovery, ordering curative measures, and requiring to pay reasonable expenses caused by the failure
How EnCase eDiscovery will help	<ul style="list-style-type: none"> In-house counsel should be familiar with their information systems and digital data. EnCase eDiscovery is an efficient and defensible in-house e-discovery system trusted by 40% of the Fortune 100 EnCase eDiscovery allows full history and audit trail reporting to evidence a party's reasonable effort to preserve Avoid burdensome and expensive 'over preservation' with unparalleled and patented optimized distributed search technology for speed, accuracy, and scalability 	

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