JONES DAY

SEPTEMBER 2016

COMMENTARY

Noteworthy Trends from Cases Decided Under the Recently Amended Federal Rules of Civil Procedure

In Brief

The December 1, 2015 amendments to the Federal Rules of Civil Procedure were designed to expedite substantive resolution of issues and curtail expansive, disproportionate discovery, with the ultimate goal being to focus courts and litigants on the specific claims and defenses at issue. In September 2015, Jones Day published a White Paper titled "Significant Changes to the Federal Rules of Civil Procedure Expected to Take Effect December 1, 2015: Practical Implications and What Litigators Need to Know," which addressed the proposed amendments and the practical impact each may have on early case management, discovery, and litigation strategy.

This *Commentary* provides an overview of emerging trends and practical impact from the first nine months of case law interpreting amended Federal Rules 26(b), 34(b), and 37(e).

New Rules or Old? Defining "Just and Practicable"

Because the amended Rules govern in all proceedings in civil cases commenced on or after December 1, 2015, "and, insofar as just and practicable, all proceedings then pending,"[1] many litigators have had to consider whether and to what extent the new rules might apply retroactively in their long-running cases. While results thus far have been mixed, the trend in such cases is toward applying the new Rules. While some courts have applied the old Rules,[2] most have explicitly determined that it would be "just and practicable" to apply the new Rules in cases pending before December 1,[3] even to motions fully briefed but undecided before the effective date.[4] Some courts applying the amended Rules have noted that the outcome under the prior version would have been the same.[5]

Federal Rule of Civil Procedure 26(b)–Applying the Proportionality Factors to Discovery Scope and Limits

By relocating existing proportionality factors from elsewhere in the Rules into the definition of the scope of discovery, the amendments to Rule 26(b) (*see* "Proportionality," White Paper, page 4) reinforce, rather than reinvent, the parties' obligation to consider proportionality in making discovery requests, responses,

and objections.[6] As expected given their new prominence, those proportionality factors have received more attention than ever from litigants and courts. It is now critical for parties to proactively address those factors in discovery requests, objections, and negotiations to demonstrate reasonableness and avoid frustrating the court.[7]

Case law emerging in the wake of the amendments reflects courts making a conscious effort to address and balance the Rule 26(b) proportionality factors, in particular when the party contesting discovery provides specific, fact-based reasons for its objections and the information sought is either irrelevant to the issues at hand or is obtainable from another source.[8] In at least two cases, courts went a step further and included in their proportionality analysis an additional factor not enumerated in Rule 26: confidentiality concerns.[9] In another case, a litigant seeking a letter rogatory to depose a non-party executive in London convinced the court that the benefit of the deposition outweighed the associated burden and expense.[10]

All this goes to show that specificity is key to a credible proportionality argument. Where parties have made specific, clear, and well-supported objections that are grounded in the proportionality factors, courts have shown an increased willingness to rule that discovery is disproportionate and impose limits accordingly.[11] On the other hand, courts are rejecting objections couched in general and boilerplate language[12] and refusing to compel responses to burdensome, overreaching requests.[13]

Notably, although the amendments *removed* the words "reasonably calculated to lead to the discovery of admissible evidence" from Rule 26(b), thus making clear that those words do *not* describe the scope of permissible discovery, some courts continue to refer to that standard, often in combination with the new proportionality factors. For example, in *Marine Power Holding, LLC v. Malibu Boats, LLC*, the District Court for the Eastern District of Louisiana denied a motion to compel after quoting the former "reasonably calculated" language and citing the new Rule's proportionality definition and factors.[14] This shows that old habits die hard, and while parties should not rely on this language in seeking discovery or formulating objections, it may still be something courts will consider in evaluating discovery disputes.

Federal Rule of Civil Procedure 34(b)–Enforcing Specificity in Responding & Objecting to Requests for Production

The amendments to Rule 34(b)(2)(B) (*see* "Requests for Production," White Paper, page 6) put a decisive end to oft-used general or blanket objections. Under amended Rule 34(b)(2)(B), parties responding to discovery requests must: (i) avoid general or blanket objections when responding to requests for production; (ii) state whether documents will be withheld pursuant to objections; (iii) state whether they will produce copies or permit inspection; and (iv) complete production "no later than the time for inspection specified in the request or another reasonable time specified in the response." Proportionality objections abiding by these requirements may work to a party's advantage in limiting unnecessary or expensive discovery.

Rule 34(b)—Specificity. In cases decided since the December 1, 2016 amendments, courts have been quick to reject boilerplate objections to discovery requests and have also penalized parties for relying on stock, general objections. In *Moser v. Holland*, for example, the District Court for the Eastern District of California held that defendants' identical boilerplate objections that each request was "overbroad, unduly burdensome and oppressive, and not reasonably calculated to lead to the discovery of admissible evidence" were improper and "barred by Rule 33 and 34."[15] The court granted plaintiff's motion to compel, ordered defendants to produce documents responsive to plaintiff's document requests, and awarded sanctions for plaintiff's costs of bringing the motion.[16]

Similarly, in *Sprint Communications Co. L.P. v. Crow Creek Sioux Tribal Court*, the District Court for the District of South Dakota, relying on the Advisory Committee Notes regarding the 2015 amendment to Rule 34(b), emphasized that although a party *could* object on the grounds that a request is overbroad, it could do so only where it also stated "the scope [of the request] that is not overbroad."[17] And in another case, the court went so far as to order plaintiffs to identify *where* in plaintiffs' production defendants could find documents responsive to their requests, including by providing specific Bates numbers of documents that fell within 10 categories of documents.[18]

These decisions underscore that the courts are focusing on whether the language and spirit of the rule is being followed. Now, more than ever, it is critical to avoid boilerplate objections like "vague" and "overbroad" without further efforts to tailor the objection to the request and to meet amended Rule 34(b)'s other requirements (e.g., identifying by category or custodian what documents will be withheld on the grounds of that objection, and also stating what documents will be produced and when).[19]

Rule 34(b)—Time to Respond. Courts have also strictly enforced the requirement that parties complete production in the time specified in the request or a reasonable time specified in the response, underscoring the need for parties to plan and draft these responses carefully. In *Granados v. Traffic Bar & Restaurant, Inc*., the District Court for the Southern District of New York ruled that defendants' responses to discovery requests were "thoroughly deficient" where defendants stated they would search for documents but gave no indication as to *when* the documents would be produced.[20] The court granted plaintiff's motion to compel and imposed its own deadline, requiring defendants to produce all responsive documents and electronically stored information ("ESI") as requested within 14 days.[21] Addressing similar responses, another court required amended responses and production of responsive documents within *seven* days.[22] In light of these holdings, the safest approach will generally be for litigants to specify their own deadlines for production rather than risk being given a court-imposed deadline that may be difficult to meet.

Federal Rule of Civil Procedure 37(e)–Determining Sanctions for Lost ESI

Rule 37(e) (*see* "ESI Preservation," White Paper, page 7) was amended to resolve a circuit split as to when courts may impose certain types of sanctions for parties' failure to preserve ESI. Amended Rule 37(e)(1) clarifies that a court *may* contemplate curative measures "[i]f [ESI] 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." Rule 37(e)(2) specifies the circumstances under which a court may impose sanctions such as an adverse inference instruction, dismissal of the action, or a default judgment.

Although the amendment to Rule 37 in some ways has clarified the law on ESI spoliation, the practical effects of the amendment are still evolving. Analyzing case law to date reveals two trends: (i) courts are *broadly* construing what constitutes "lost ESI" subject to "measures no greater than necessary to cure the prejudice" under Rule 37(e)(1); and (ii) courts are *narrowly* construing what constitutes intentional deprivation of information warranting sanctions under Rule 37(e)(2).

In one case that exemplifies both trends, *CAT3, LLC v. Black Lineage, Inc*., the District Court for the Southern District of New York concluded after an evidentiary hearing that plaintiffs in a trademark infringement suit intentionally deleted emails from their server and replaced them with copies that had been altered to give the appearance that plaintiffs sent emails to defendants from a domain that included the trademarked name.[23] Plaintiffs argued that nothing was "lost" that could not be "restored or replaced" because only the address line of the emails was affected and because defendants had produced near-duplicates of the same emails.[24]

Nonetheless, after finding "clear and convincing evidence … that the plaintiffs manipulated the emails [] in order to gain an advantage in the litigation," the court ruled that ESI was "lost" and could not "adequately be 'restored or replaced.'"[25] Although the court further concluded that "the plaintiffs' manipulation … [was] not consistent with taking 'reasonable steps' to preserve the evidence," the court did not impose the sanctions outlined in Rule 37(e)(2).[26] Instead, relying on the Advisory Committee Note stating "[t]he remedy [imposed by the court] should fit the wrong, and the severe measures authorized by this subdivision should not be used when the information was relatively unimportant or lesser measures such as those specified in subdivision (e)(1) would be sufficient to redress the loss," the court precluded plaintiffs from relying on the altered version of the emails and ordered plaintiffs to pay defendants' costs and reasonable attorneys' fees incurred in securing relief for the spoliation.[27]

Muting the effect of the broad definition of "lost" ESI are the limited circumstances under which courts have imposed the sanctions identified in Rule 37(e)(2). Most often, courts decline to impose an adverse inference or dismissal sanction because the party seeking sanctions fails to present evidence demonstrating that the nonpreserving party intended

to deprive it of ESI.[28] Instead, courts choose to limit the curative measures imposed to those "no greater than necessary to cure prejudice," as Rule 37(e)(1) dictates.[29]

It is important to remember that despite courts' broad interpretation of what constitutes "lost ESI," these cases also underscore a point that the Advisory Committee made clear: Rule 37 "does not call for perfection." Rather, "[r]easonable steps taken to preserve," which are assessed based on the party's particular circumstances, generally suffice to escape sanctions under Rule 37.

One recent case where the plaintiff's conduct fell outside this "safe harbor" is *Matthew Enterprise, Inc. v. Chrysler Group, LLC*, in which responsive emails were deleted when plaintiff switched to a new email vendor almost a year after receiving notice of the litigation.[30] In assessing the propriety of curative measures under Rule 37(e)(1), the District Court for the Northern District of California found that plaintiff did *not* take reasonable steps to preserve ESI and that defendant was prejudiced by the loss.[31] The court denied defendant's request to preclude plaintiff from offering evidence in support of a central issue in its case, observing that the Advisory Committee Notes describe such preclusion as an "example of an inappropriate (e)(1) measure."[32] Instead, the court awarded defendant attorneys' fees associated with bringing the motion and authorized defendant to introduce at trial communications post-dating the alleged wrongdoing and also, but only if plaintiff opened the door, evidence of spoliation.[33] The court left open the possibility that defendant could seek an adverse jury instruction pursuant to Rule 37(e)(2).[34]

Regarding the sanctions specified in Rule 37(e)(2), the drafters of the amendments did not provide a standard for what constitutes "intent to deprive another party of the information's use in litigation." Clearer standards for qualifying conduct will emerge in time, but for now, courts have narrowly construed what constitutes willful intent.[35] Additionally, a party's negligent or even grossly negligent failure to preserve ESI will not warrant sanctions under Rule 37(e)(2) without evidence of bad faith or an intent to deprive.[36] For example, in *Living Color Enterprises, Inc. v. New Era Aquaculture, Ltd.*, the District Court for the Southern District of Florida found that even if defendant's deletion of text messages following initiation of the lawsuit was negligent, the ESI was not deleted with the intent to deprive plaintiff of the ESI in the litigation, and as a result, sanctions were improper under Rule 37(e)(2).[37]

Notably, despite the fact that the Advisory Committee's Note amending Rule 37(e)(2) explicitly "rejects cases such as [*Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99, 107 (2d Cir. 2002)] that authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence," some courts have continued to follow the *Residential Funding* standard in cases involving issues raised prior to the effective date of the amendments[38] or where tangible evidence was destroyed rather than ESI.[39]

Conclusion

In the first nine months since the December 1, 2015, amendments took effect, courts have paid close attention to the goals behind the amendments. The amendments' influence has been particularly evident in case law applying proportionality principles in rulings regarding the scope of discovery. Case law to date also suggests that courts, by strictly adhering to Rule 37's limits, are creating a disincentive to the filing of frivolous or even borderline motions for sanctions. The landscape will no doubt continue to evolve in the months to come.

Key Takeaways

- With the Rule 26 proportionality factors receiving increased attention from litigants and courts, it is critical for parties to proactively address those factors in discovery requests, objections, and negotiations to demonstrate reasonableness and avoid frustrating the court.
- Under Rule 34, specificity is the key to making proportionality and other objections that may work to a party's advantage in limiting unnecessary or expensive discovery.
- Courts are strictly enforcing Rule 37(e)'s new limits on curative measures and sanctions for lost electronically stored information.

Lawyer Contacts

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com/contactus/.

Joshua L. Fuchs
Houston
+1.832.239.3719
jlfuchs@jonesday.com

Jennifer W. FitzGerald
Pittsburgh
+1.412.394.7993
jwfitzgerald@jonesday.com

Carmen G. McLean
Washington
+1.202.879.3744
cgmclean@jonesday.com

Ashley F. Heintz
Atlanta
+1.404.581.8978
aheintz@jonesday.com

Irene S. Fiorentinos
Chicago
+1.312.269.4155
ifiorentinos@jonesday.com

Elizabeth J. Marino
Chicago
+1.312.269.1547
ejmarino@jonesday.com

Endnotes

1 Order re: Amendments to Federal Rules of Civil Procedure (U.S. Apr. 29, 2015).

2 *See, e.g.*, *McIntosh v. United States*, No. 14-CV-7889, 2016 WL 1274585, at *32 (S.D.N.Y. Mar. 31, 2016) (concluding that "it would fall short of justice and practicability to apply the new Rule 37(e) to Plaintiff's Motion"); *Freeman v. Atchison*, No. 14-CV-614, 2016 WL 1059219, at *1 (S.D. Ill. Mar. 17, 2016) (affirming December 21, 2015 order of magistrate judge that "correctly relied [] on the [2010] version of Rule 26," which was the version in effect "when [plaintiff] served his discovery requests").

3 *See, e.g.*, *Robinson v. Dallas Cty. Cmty. Coll. Dist.*, No. 3:14-CV-4187-D, 2016 WL 1273900, at *3 (N.D. Tex. Feb. 18, 2016) (finding it "just and practicable" to apply the amended Rule 26 to plaintiff's motion to compel "where the briefing does not reflect any contrary position by the parties and where Plaintiff only requested the deposition at issue after the amendments' effective date"); *CAT3, LLC v. Black Lineage, Inc.*, No. 14-CIV-5511, 2016 WL 154116, at *5 (S.D.N.Y. Jan. 12, 2016) (finding that new Rule 37 applied due to the presumption in favor of applying the new Rules and "because the amendment is in some respects more lenient as to the sanctions that can be imposed for violation of the preservation obligation, there is no inequity in applying it").

4 *See, e.g.*, *Matthew Enter., Inc. v. Chrysler Grp. LLC*, No. 13-CV-04236, 2015 WL 8482256, at *1 n.7 (N.D. Cal. Dec. 10, 2015) (finding it "just and practicable" to apply amended Rule 26(b) to motion filed prior to the amendments' effective date); *but cf. Trowery v. O'Shea*, No. 12-CV-6473, 2015 WL 9587608, at *5 n.11 (D.N.J. Dec. 30, 2015) ("Since the parties briefed the motions and conducted oral argument under the prior rule, the [c]ourt finds that it is not just and practicable to apply the amended rules in connection with these motions.").

5 *E.g.*, *Garner v. St. Clair Cty., Ill.*, No. 15-CV-00535, 2016 WL 1059238, at *2 n.3 (S.D. Ill. Mar. 17, 2016) (noting amendment to Rule 26 (b)(1), but finding that analysis of the instant discovery requests would be the same under both versions of the rule); *Bounds v. Capital Area Family Violence Intervention Ctr., Inc.*, CA No. 14-802, 2016 WL 1089266 (M.D. La. Mar. 18, 2016) (same).

6 *See Dao v. Liberty Life Ass. Co.*, No. 14-CV-04749, 2016 WL 796095, at *3 (N.D. Cal. Feb. 23, 2016) (finding that amended Rule 26(b)(1) "does not actually place a greater burden on the parties with respect to their discovery obligations, including the obligation to consider proportionality, than did the previous version of the Rule"); *White Mtn. Cmtys. Hosp. Inc. v. Hartford Cas. Ins. Co.*, No. 3:13-CV-8194, 2015 WL 8479062, at *2 n.5 (D. Ariz. Dec. 9, 2015) (stating that the amendments to Rule 26(b) do not change courts' or parties' responsibilities to consider proportionality).

7 *See, e.g.*, *Lynch v. North American Co. for Life and Health Ins.*, No. 1:16-cv-00055, 2016 WL 3129107, at *5 n.7 (D. Idaho June 2, 2016) (court denied motion to dismiss, noting amendments to Rules 1 and 26 and "caution[ing] the parties to be mindful of the proportionality and cooperation requirements of the amended rules" as they proceeded to discovery phase).

8 *See, e.g.*, *Wal-Mart Puerto Rico, Inc. v. Zaragoza-Gomez*, No. 3:15-cv-03018, 2016 WL 109885, at *2 (D.P.R. Jan. 8, 2016) (in case involving Wal-Mart challenge to the legality of a tax, rejecting Commonwealth's request for discovery into Wal-Mart PR's internal financial data and holding that Commonwealth failed to show "how prolonged discovery about the financial innards of Wal-Mart PR, one taxpayer amongst many, is 'relevant' or 'proportional'" to the tax's legality); *Rickaby v. Hartford Life & Accident Ins. Co.*, No. 15-CV-00813, 2016 WL 1597589, at *4 (D. Colo. Apr. 21, 2016) (conducting Rule 26(b) proportionality analysis and holding that additional discovery sought in ERISA case was "extensive and unnecessary" and that compelling its production "would impose an undue burden … given the questionable relevance").

9 In *Pertile v. General Motors, LLC*, No. 1:15-cv-00518, 2016 WL 1059450, at *2–5 (D. Colo. Mar. 17, 2016), the District Court for the District of Colorado denied plaintiff's discovery requests for protected trade secrets, noting that "[r]elevance has never been the only consideration under Rule 26" and concluding that even assuming the information sought was relevant, defendant's confidentiality concerns outweighed plaintiff's need for the information. Similarly, in *In re Takata Airbag Products Liability Litigation*, No. 1:15-cv-20664, MDL No. 2599, 2016 WL 1460143, at *2 (S.D. Fla. Mar. 1, 2016), the District Court for the Southern District of Florida allowed defendants to redact competitively sensitive information as long as it did not concern airbags, the subject of the litigation. Reviewing *de novo* a special master's report issued prior to the December 1, 2015, amendments, the district court "balance[d] the producing parties' desire to protect their competitively sensitive information" against "the importance of the issues at stake in th[e] action and the importance of the discovery in resolving the issues at hand." *Id.* at *2–3.

10 In *MicroTechnologies, LLC v. Autonomy, Inc.*, No. 15-CV-02220, 2016 WL 1273266 (N.D. Cal. Mar. 14, 2016), the District Court for the Northern District of California weighed the defendant's need and access to information regarding its "serious" counterclaims against the expense and burden *on the third party* (an individual), ultimately finding—without explicitly affording more weight to the fact that the objector was not a party to the litigation—that "each proportionality factor support[ed] the conclusion that the deposition … would be proportional to the needs of th[e] case." *Id.* at *2. The court cited pre-amendment precedent for the proposition that the discovery limits set by Rule 26(b) apply to letters rogatory. *Id.* at *1.

11 *See, e.g.*, *Black v. Buffalo Meat Serv., Inc.*, No. 15-CV-49S, 2016 WL 4363506, at *6 (W.D.N.Y. Aug. 16, 2016) (in employment discrimination case, siding with defendants' tailored proportionality objections and rejecting plaintiff's requests for broad categories of documents as "disproportionate to the claims at issue").

12 *See, e.g.*, *McKinney/Pearl Rest. Partners, L.P. v. Metro. Life Ins. Co.*, No. 3:14-CV-2498-B, 2016 WL 2609994, at *8 (N.D. Tex. May 6, 2016) (rejecting insufficiently supported objection to depositions as unduly burdensome and noting that under the amended Rules, parties "still bear[] the burden of making a specific objection and showing that the discovery fails the proportionality calculation mandated by Rule 26(b) by coming forward with specific information to address—insofar as that information is available to it—[the Rule 26(b)(1) proportionality factors]"); *Digital Ally, Inc. v. Utility Associates, Inc.*, No. 14-2262, 2016 WL 1535979, at *4 (D. Kan. Apr. 15, 2016) (overruling the objections of a defendant who "[a]side from simply stating the terms … ha[d] not expounded on its objections to relevance or proportionality").

13 *See, e.g.*, *Robertson v. People Magazine*, No. 14 CIV 6759, 2015 WL 9077111, at *2 (S.D.N.Y. Dec. 16, 2015) (finding plaintiff's discovery requests in race discrimination case "burdensome and disproportionate" because instead of seeking discovery aimed at the alleged discriminatory conduct, plaintiff sought "nearly unlimited access" to defendant's editorial files, which was burdensome and went well beyond the scope of plaintiff's claims).

14 No. 14-0912, 2016 WL 403650, at *2–3 (E.D. La. Jan. 11, 2016) (observing, in subsequent discussion, that the "reasonably calculated" phrase had been deleted from Rule 26 and that "the change is designed to curtail reliance on the 'reasonably calculated' phrase to expand discovery beyond the permitted scope"); *see also Gilbert v. Rare Moon Media, LLC*, No. 15-MC-217-CM, 2016 WL 141635, at *7 (D. Kan. Jan. 12, 2016) (holding that plaintiff's document request topics were unduly burdensome and including the former Rule 26(b)'s "reasonably calculated" language in its analysis).

15 *Moser v. Holland*, No. 2:14-CV-02188, 2016 WL 426670, at *1, 3 (E.D. Cal. Feb. 4, 2016).

16 *Id.* at *4; *see also Spencer v. City of Orlando*, No. 6:15-cv-345, 2016 WL 397935, at *2 (M.D. Fla. Feb. 2, 2016) (internal marks and citation omitted) (stating that "vague, overly broad and unduly burdensome" objections are "meaningless standing alone").

17 No. 4:10-CV-04110, 2016 WL 782247, at *5 (D.S.D. Feb. 26, 2016) (granting portions of defendant's motion to compel and also noting that the amendments require "[t]he producing party" to "alert other parties to the fact that documents have been withheld and thereby facilitate an informed discussion of the objection") (citation omitted).

18 *Kissing Camels Surgery Ctr., LLC v. Centura Health Corp.*, No. 12-CV-03012, 2016 WL 277721 (D. Colo. Jan. 22, 2016) (rejecting plaintiffs' objections that several requests were duplicative and that they had "already produced responsive documents"). Notably, the court made this ruling even though it *also* found defendants' requests "improper on their face as omnibus requests." *Id.* at *2.

19 *See, e.g.*, *In re Adkins Supply, Inc.*, No. 11-10353-RLJ-7, 2016 WL 4055013, at *4 (Bankr. N.D. Tex. July 26, 2016) (striking defendant's general objections made on the basis of work product and attorney-client privilege, relevance, that the requests were unduly burdensome, and that the documents sought were protected as trade secret information); *see also Orix USA Corp. v. Armentrout*, No. 3:16-MC-63-N-BN, 2016 WL 3926507, at *2 (N.D. Tex. July 21, 2016) (holding that "a non-party's Rule 45(d)(2)(B) objections to discovery requests in a subpoena are subject to the same prohibition on general or boilerplate [or unsupported] objections" and specificity requirements as objections made by a party).

20 *Granados v. Traffic Bar & Rest., Inc.*, No. 13 Civ. 0500, 2015 WL 9582430, at *3 (S.D.N.Y. Dec. 30, 2015).

21 *Id.* at *4.

22 *Loop AI Labs Inc. v. Gatti et al.*, No. 15-cv-00798, 2016 WL 2342128, at *3–4 (N.D. Cal. May 3, 2016).

23 No. 14 Civ. 5511, 2016 WL 154116, at *8–9 (S.D.N.Y. Jan. 12, 2016).

24 *Id.* at *5.

25 *Id.* at *9.

26 *Id.* at *9–10.

27 *Id.* at *10.

28 *See, e.g.*, *SEC v. CKB168 Holdings, Ltd.*, No. 13-cv-5584, 2016 U.S. Dist. LEXIS 16533, at *13 (E.D.N.Y. Feb. 2, 2016) (holding that failure to preserve hard drive did not warrant adverse inference where the SEC did not present adequate evidence that the defendant intended to deprive the SEC of the hard drive or even that the evidence sought from the hard drive ever existed); *Bry v. City of Frontenac*, No. 4:14-CV-1501, 2015 WL 9275661, at *11 n.7 (E.D. Mo. Dec. 18, 2015) (holding that even if defendants had failed to preserve ESI, sanctions under Rule 37(e)(2) were not available where the plaintiff offered no evidence suggesting that defendants had destroyed evidence, much less that they had acted "with the intent to deprive another party of the information's use in the litigation"); *Best Payphones, Inc. v. The City of New York*, No. 1-CV-3924, 2016 WL 792396, at *7–8 (E.D.N.Y. Feb. 26, 2016) (apart from awarding attorneys' fees to defendants for bringing the motion, declining to impose curative measures under Rule 37(e)(1) *or* sanctions under Rule 37(e)(2) for plaintiff's failure to issue a litigation hold or prevent auto-deletion of emails, where plaintiff's conduct was not willful or even grossly negligent and defendants were not prejudiced).

29 *See, e.g.*, *Brown Jordan Int'l, Inc. v. Carmicle*, 0:14-CV-60629, 2016 WL 815827, at *37 (S.D. Fla. March 2, 2016) (declining to impose dismissal, default, or attorneys' fees as sanctions where less extreme measures, including adverse inferences, sufficed).

30 No. 13-cv-04236, 2016 WL 2957133, at *3–4 (N.D. Cal. May 23, 2016).

31 *Id.*

32 *Id.* at *5.

33 *Id.*

34 *Id.*

35 *See, e.g.*, *NuVasive, Inc. v. Madsen Medical, Inc.*, No. 13-cv-2077, 2016 WL 305096, at *3 (S.D. Cal. Jan. 26, 2016) (finding no evidence of intent where plaintiff could not demonstrate that certain text messages were destroyed so as to deprive plaintiff of the use of those messages in the litigation).

36 *See*, *e.g.*, *Living Color Enterprises, Inc. v. New Era Aquaculture, Ltd.*, No. 14-CV-62216, 2016 WL 1105297, at *6 (S.D. Fla. March 22, 2016); *Martinez v. City of Chicago*, No. 14-cv-369, 2016 WL 3538823, at *24 (N.D. Ill. June 29, 2016).

37 2016 WL 1105297, at *6.

38 *See, e.g.*, *Learning Care Grp. v. Aspira Mktg. Direct, LLC*, No. 3:13-CV-1540, 2016 WL 4191251 (D. Conn. June 17, 2016) (concluding that applying amended Rule 37(c) would be "neither just nor practicable, because the parties first raised this issue in September 2015, prior to the application of the new rules," and imposing sanction of attorney's fees and costs under *Residential Funding Corp.* for the negligent destruction of ESI).

39 *See, e.g.*, *Coale v. Metro-North Railroad Co.*, No. 3:08-cv-01307, 2016 WL 1441790, at *4 n.7 (D. Conn. April 11, 2016) (noting amended Rule 37(e) applies only to ESI and relying on *Residential Funding Corp.* negligence standard to award sanctions for defendant's destruction of a physical substance).