



# Winning the Case Without Breaking the Bank: Leveraging Recent Rule Changes

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# Rising Costs of Litigation Leads to Fewer Trials

- Only 1.7% of federal court civil cases go to trial
- Compare with 11.5% resolution by trial in 1962
- Advent of ESI has dramatically increased litigation costs
- Impact of Higher Litigation Costs
  - Homogenization of Good/Bad Claims resolved by settlement
  - Fewer Trials
  - Young Attorneys not gaining trial experience
  - Trial lawyers are a dying breed
  - Lack of case law will lead to uncertainty



# Concerns About the Scope and Cost of Litigation

- December 2015 Changes to the Federal Rules of Civil Procedure

“the product of five years of intense study, debate, and drafting to address the most serious impediments to just, speedy, and efficient resolution of civil disputes”

~ Chief Justice Roberts

- July 2015 Changes by the AAA to the Construction Industry Arbitration Rules





# Common Terms and Abbreviations

- ESI – electronically stored information
- ECA – early case assessment (a.k.a., EDA – early data analysis)
- ET – email thread detection
- ND – near dupe detection to increase review efficiency
- NR – Non-responsive
- Infogov – electronic information governance
- TAR/PC – technology assisted review or predictive coding



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## Discussion Hypotheticals



# Hypothetical #1: The Scope of Discovery

- In her litigation seeking additional compensation for construction work at the Barack Obama Presidential Library, Bully Builder seeks e-mail and construction plans from GSA for every library built for the last 25 years
- GSA objects on scope and proportionality grounds.
- Bully responds in a motion to compel that the ESI is reasonably calculated to lead to discoverable information
- GSA cross-moves for a protective order for discovery outside the scope of permissible discovery



# Hypothetical #1: The Scope of Discovery

How do you rule?

A - Sanctions against GSA – the objections lack specificity

B - Sanctions against Bully – he should know better

C - Grant Bully's MTC – the ESI is reasonably calculated to lead to the discovery of admissible evidence

D - Grant Bully's MTC because Rule 26(a)(1)(B) applies



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## FRCP 26(b)(1)

### Discovery Scope and Limits.

(1) *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.**



## The Death of “Reasonably Calculated”

“The 2015 amendments thus eliminated the ‘reasonably calculated’ phrase as a definition for the scope of permissible discovery. Despite this clear change, many courts continue to use the phrase. Old habits die hard.”

Judge David Campbell

*In re: Bard IVC Filters Products Liability Litigation*

2016 WL 4943393



## Is Referencing “Reasonably Calculated” Sanctionable?

“Mr. Ryan's citation to caselaw applying a prior version of Federal Rule of Civil Procedure 26(b)(1) is inexcusable. Mr. Ryan's explanation for the error is unpersuasive.”

Judge James L. Robart  
*Fulton v. Livingston Fin. LLC*  
2016 WL 3976558



## Hypothetical #2: Those Darn Texts

- Sammy Seconds is an hourly construction worker that communicates with Shelly Supervisor via text message and SlapChat
- Both are using personal devices
- Shelly advises Sammy that this is against company policy, but Sammy continues anyway
- Sammy is fired for unrelated attendance issues and files a wrongful termination claim
- Sammy demands that the company preserve all text messages on personal devices for all 132 employees that Shelly supervises.
- How do you advise your company client?





## Hypothetical #2: Those Darn Texts

How do you advise your company client?

A – Take a forensic image of every personal device and preserve it.

B – Object, these devices are not within the custody and control of company.

C – Ask employees to forward the texts to defense counsel.

D – None of the above.



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## Amendment to Rule 37(e)

### *Failure to Preserve Electronically Stored Information:*

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, and it cannot be restored or replaced through additional discovery, the court:

- (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
- (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
  - (A) presume that the lost information was unfavorable to the party;
  - (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
  - (C) dismiss the action or enter a default judgment.



## Hypothetical #3: The ESI Deposition

- After a meet and confer, Patrick Plaintiff serves a 30(b)(6) notice for an ESI deposition that includes 15 topics, including one that simply states that Defendant should prepare to discuss “ediscovery and infogov” by the Defendant, Instant Innovations
- Jenny Counsel for Instant Innovations offers informal meet-and-confers and informal written discovery because of the cost and time to prepare for a witness on nearly every system at Instant Innovations
- Patrick moves to compel Instant Innovations to proffer a witness





# Hypothetical #3: The ESI Deposition

How do you rule?

A - Order the ESI deposition, Patrick is entitled to it.

B - Deny the ESI deposition, it is outside the scope of permissible discovery.

C – Phase the ESI discovery, starting with informal discovery, order a status report in 30 days.

D - Order Jenny and Patrick to meet and confer and video tape it. If they don't develop a resolution, order them to produce the video.



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## Hypothetical #4: Arbitration

- Bully Builder's counsel is served with a copy of a third-party subpoena served on the project owner by a subcontractor who is pursuing Bully Builder for non-payment in an arbitration pending before the AAA
- The subcontractor's subpoena attaches an extensive list of requested documents, including electronic schedules maintained by the project owner's outside construction scheduler.



## Hypothetical #4: Arbitration

- Bully Builder has already provided hard copies of the schedules, and does not want owner to produce the schedules in electronic format, even though Bully Builder and the subcontractor agreed at the outset that all documents would be produced in native format and Bully Builder's primary defense is that the subcontractor delayed the project.
- The subcontractor files a successful request with the arbitrator under R-24 seeking to compel production of the electronic schedules.
- Subcontractor seeks sanctions when the electronic schedules are not produced.





## Hypothetical #4: Arbitration

How do you rule on the question of sanctions?

A – Dismiss Bully Builder’s offset counterclaim

B – Advise that you will make an adverse inference of Bully Builder’s claim of subcontractor delay as a result of not producing

C – Exclude Bully Builder’s evidence of delay

D - Enter summary judgment in favor of subcontractor

C - Deny the request as Bully Builder is not guilty of willful non-compliance



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## AAA R-25 and R-60

- Under R-25, an arbitrator has broad authority in the case of “willful non-compliance with any order issued by the arbitrator,” to enforce R-23 and R-24, including “drawing adverse inferences, excluding evidence and other submissions, and/or making special allocations of costs or an interim award of costs arising from such non-compliance.... ”
- R-60 permits an arbitrator to “order appropriate sanctions where a party fails to comply with its obligations under these rules or with an order of the arbitrator....”
- Where a sanction limits a party’s participation in the arbitration or adversely determines an issue, due process considerations apply



## Hypothetical #5: “I object!”

- Patty Plaintiff requests “Any and all documents and ESI concerning, regarding or about complaints about construction defects in any location concerning, regarding or about the type of matters alleged.”
- Yvette Yates: “objects for all applicable reasons in the general objections, and further objects that the request is vague, over broad, burdensome, not proportional, incomprehensible, etc. and without waiver of these objections, will at a future time produce responsive and non-privileged documents.”





## Hypothetical #5: “I object!”

Is there anything wrong with Yvette’s objections?

A - This is a valid discovery request and response.

B - This violates Rule 34(b)(1)(A)

C - This violates Amended Rule 34(b)(2)(B) and (C)

D - This violates Rule 37(d)(3).

E - Both B and C, and both parties should be sanctioned.



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## FRCP 34(b)

*(1) Contents of the Request.* The request:

(A) Must describe with **reasonable particularity** each item or category of items to be inspected;...

*(2) Responses and Objections. ...*

(B) *Responding to Each Item.* ... the response must ... state with **specificity the grounds for objecting** to the request, including the reasons. ...

(C) *Objections.* An objection must state whether **any responsive materials are being withheld....**



## Hypothetical #6: Tom's TAR

- Suspicious Subcontractor Stan objects to Bully Builder's use of TAR for document review
- TAR is absent from the negotiated and later court-ordered ESI protocol
- The ESI protocol states that "Responding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information."
- Stan moves to compel production of 10,000 NR documents to verify that Bully's TAR technology works.





## Hypothetical #6: Tom's TAR

How do you rule on the motion to compel?

A - Order the production of the NR documents – the ESI protocol didn't prevent it

B - Order the production of the NR documents – Cooperation and transparency mandate it

C - Deny the MTC – Stan isn't entitled to NR documents

D - Order a 30(b)(6) of Tom's ESI representative. Stan is entitled to know more about the TAR process



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## FRCP 26(g)

... Every ...response must be signed by at least one attorney.... By signing, an attorney ... certifies that to the best of the person's knowledge, information, and belief formed **after a reasonable inquiry: ...**



## FRCP 26(f)

- (3) Discovery Plan.* A discovery plan must state the parties' views and proposals on: ...
- (C) any issues about disclosure, discovery, or preservation of electronically stored information....





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## Best Practices for the Trial Lawyer and Client

Line up ESI protocol with new Federal Rules



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## Best Practices for the Trial Lawyer and Client

Revamp your protective order provisions



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## Best Practices for the Trial Lawyer and Client

Draft litigation management plan and revisit often



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## Best Practices for the Trial Lawyer and Client

Take charge of discovery at the outset

- Planning Conference
- Joint Discovery Plan





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Know your options – escalate as appropriate

- Meet and confer conferences
- Engage the U.S. Magistrate informally



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## Consider use of:

- Dispositive motions
- Submitting case on stipulations
- Other summary proceedings



## Chief Justice Roberts:

“The 2015 civil rules amendments are a major stride toward a better federal court system. But they will achieve the goal of Rule 1 – ‘the just, speedy, and inexpensive determination of every action and proceeding’ – only if the entire legal community, including the bench, bar, and legal academy, step up to the challenge of making real change.”





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