Federal Changes Proposed for eDiscovery Litigation Rules: Several Modifications will Directly Impact HIM

By Ron Hedges, JD

Courts don't remain civil on their own. It takes well-crafted procedural rules, enforced by knowledgeable attorneys and judges, to keep the American legal system humming along in an orderly fashion. Aiding with the civility of the law is the Federal Rules of Civil Procedure (Federal Rules), a wide-reaching set of congressionally approved court-based procedural rules that govern civil lawsuits. In part, these rules govern processes related to eDiscovery of health information, as well as set standards for preservation and spoliation of health information that is, or could be, part of a civil lawsuit.

To help health information management (HIM) professionals—who often can be pulled into healthcare lawsuits due to their work with patient records and health information systems—become leaders on these federal rules, the following describes the framework of the Federal Rules, how the Federal Rules control civil litigation in the United States courts, and how this framework may change on December 1, 2015.

Federal Rules Primer

The Federal Rules govern procedure in the United States district courts. They do not address substantive law, and the procedural rules cannot create "rights" that can be enforced in the United States courts. That is the province of Congress. The rules determine the "how" of litigation, not the "why."

These Federal Rules are not applicable in state courts. Every state has its own procedural rules, although a number of states have adopted, in whole or in part, the text of the Federal Rules. What procedural rules apply to a given civil action depend on the court where the action is pending.

Framework of the Federal Rules

In order to describe the changes that may be coming to the Federal Rules, one must first focus on several aspects of the Federal Rules as they exist today. The focus will be on those specific rules that health information management professionals would likely find to be of interest.

First, according to the rules themselves, the Federal Rules should be "construed and administrated to secure the just, speedy, and inexpensive determination of every action." Second, the Federal Rules allow a lot of discovery between parties and from non-parties through subpoenas—including discovery for both paper and electronic health records. The scope of discovery is broad to allow for any relevant information to be "found" in the adversary process.

The Federal Rules require parties to "meet-and-confer" in the early stages of a civil action to, among other things, discuss any issues about preserving discoverable information and develop a proposed discovery plan. The plan is submitted to a judge assigned to the action, who issues a scheduling order that can incorporate agreements between the parties and controls the progress of the action toward final disposition.

The Federal Rules speak about "proportionality" of discovery. A party can request a lot in discovery from another party. The latter can object to the discovery request for a number of reasons, including that "the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues," according to the Federal Rules. Proportionality also applies when information is sought from a non-party by subpoena. Whoever seeks the information "must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena," according to Federal Rule 45(c)(1).

The Federal Rules were amended on December 1, 2006 to explicitly address discovery of electronically stored information (ESI)—such as health information stored in an electronic health record system. Rules 16(b) and 26(f)(2) were among those amended that modified the eDiscovery procedures.

In 2006 Federal Rule 37(e) was adopted, intended to limit the imposition of eDiscovery-related sanctions: "Absent extraordinary circumstances, a court may not impose sanctions under these rules on a party for failing to provide [ESI] lost as a result of the routine, good-faith operation of an electronic information system."

While the eDiscovery amendments are less than eight years old, there may be more eDiscovery amendments coming soon.

History of Recently Proposed Federal Rule Changes

In 2010 a conference was held at Duke University School of Law that kicked off discussion of the 2006 amendments. The Judicial Conference of the United States—which governs the Judicial Branch of the federal government—requested that its Standing Committee on Rules of Practice and Procedure work with its Civil Rules Advisory Committee to sponsor a conference at Duke University School of Law on May 10–11, 2010, to explore the current costs of civil litigation—particularly discovery—and to discuss possible solutions.

The conference considered empirical research done by the Federal Judicial Center and others to assess the degree of satisfaction with the performance of the present system as well as suggestions from lawyers and academics as to how the system could be improved. This research was supplemented by additional empirical data. A major portion of the conference was devoted to an assessment and discussion of the empirical research.

The conference drew on insights and perspectives from lawyers, judges, and academics concerning improvements that could be made to the federal civil litigation process to better effectuate the purposes of the Federal Rules, which are, again, "to secure the just, speedy, and inexpensive determination of every action and proceeding." In addition to considering the results of the empirical research, panels of experts considered the range of issues in the federal civil litigation process that could be used more efficiently to accomplish the purposes of the Federal Rules, including the discovery and eDiscovery process, pleadings, and dispositive motions. Other topics considered include judicial management and the tools available to judges to expedite the process, the process of settlement, and the experience of the states.

There has been widespread dissatisfaction, principally within the corporate community, with the perceived failure of the 2006 eDiscovery amendments to address the scope of preservation and spoliation. Given the increasing volumes of ESI that might be discoverable, there was a widespread concern about over-preservation—that is, a party erring on the side of keeping expansive amounts of ESI rather than risking spoliation sanctions. Moreover, there was a widespread concern that the "safe harbor" that Federal Rule 37(e) was intended to provide for the "routine" loss of ESI turned out to be unavailable to most parties who faced a spoliation sanction. This dissatisfaction, among other things, led to pending proposals to amend the Federal Rules—several of which are discussed below.

Proportionality and Scope of Discovery Amendments Proposed

As mentioned before, one concern raised at the Duke conference was the propensity of corporate organizations to take part in the over-preservation of ESI. Several proposed amendments address that concern. These include:

- Amended Federal Rules 26(f) and 16(b) would add preservation to the topics to be addressed in a discovery plan and included in a scheduling order. In other words, parties would be encouraged to think about the scope of preservation early in the litigation and reach agreement on scope while judges would understand that scope—whether through party agreement or a ruling on a dispute about scope—should be the subject of a scheduling order.
- The proportionality principle now in Federeal Rule 26(b)(2)(C) would be moved to Federal Rule 26(b)(1), which defines the scope of discovery. The intent of this move is to encourage parties to consider proportionality when making discovery requests and to emphasize that proportionality is a central factor in discovery.
- Rule 26(b)(1) would also be amended to read, in the final sentence, that "information within this scope of discovery need not be admissible in evidence to be discoverable." This will replace the current sentence "relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible

evidence." This change is intended to avoid a party's reliance on the "reasonable calculated" language to argue for discovery that is not "relevant to a claim or defense" and to impose some limitation on the scope of discovery.

Proposed Spoliation Sanctions Amendments

Amending Federal Rule 37(e), which governs sanctions imposed due to the spoliation of evidence, proved to be remarkably contentious. Over 2,000 written comments were received by the Civil Rules Advisory Committee and over 100 individuals testified to the committee about the proposed amendment. If the proposed changes are implemented, Federal Rule 37(e) would be completely rewritten. It would apply only to the loss of ESI and would read:

"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 may:

1. Upon finding of prejudice to another party from loss of the information, 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;

    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"

The "new" Federal Rule 37(e) makes specific reference to "information that should have been preserved." In other words, this phrase would relate back to the "tightened" definition of scope of discovery in amended Federal Rule 26(b)(1). The proposed rule speaks of a party having taken "reasonable steps" to avoid the loss of ESI. In other words, the amendment would not require perfection.

The proposed rule also distinguishes between the "mere" loss of ESI and the loss of ESI "with the intent to deprive another party of the information's use." So for something really bad to happen, a party has to lose ESI with a specific state of mind. The rule permits various unspecified "remedial" measures to be used if a party is "prejudiced" by the loss of ESI.

Timeline on Proposed Amendments

So what is holding up these proposed amendments from not becoming effective until December 1, 2015? The amendment process takes a long time. There has been significant written comment, and three hearings have been conducted at which a number of individuals testified on the amendments. Two committees consisting of federal judges and learned individuals have approved the proposed amendments. The amendments will next be considered by the Judicial Conference of the United States when it meets in September. If the Judicial Conference approves the proposed amendments, the amendments then go to the United States Supreme Court for review and approval or rejection. If adopted in whole or in part, the amendments are "lodged" with Congress who can then either approve, change, or strike down the amendments. Unless Congress acts, the amendments will become effective December 1, 2015. These "stages" take place over long time periods, hence the effective five-years-in-the making implementation date of December 1, 2015.

The amendments themselves can be modified during the process. The Judicial Conference, the Supreme Court, and Congress all have a role to play in the amendment process, and there is no guarantee that the proposed amendments as they are presented will be adopted.

Rule Changes' Impact on HIM

These and other proposed Federal Rules changes have a direct impact on HIM professionals. For example, "reasonableness" is the key to avoiding any sanction connected to these rules. Developing a defensible records retention policy, perhaps within an overall information governance structure, that anticipates the imposition of a duty to preserve is vital for all HIM departments. Staff must document that policy, implement it, and monitor it.

Also, HIM professionals can avoid ad hoc decision-making about health information preservation with a formal policy. Ad hoc decision-making, or giving discretion to individual employees or business units to make decisions about what or how to preserve information, could be seen by the courts as unreasonable and a violation of its preservation rules.

Ron Hedges (r_hedges@live.com) is a former United States Magistrate Judge in the District of New Jersey and is currently a writer, lecturer, and consultant on topics related to electronic information. This article is intended solely for educational purposes; it is not intended to provide legal advice.

Article citation:
Hedges, Ron. " Federal Changes Proposed for eDiscovery Litigation Rules: Several Modifications will Directly Impact HIM" *Journal of AHIMA* 85, no.8 (August 2014): 50-53.