

# Changes to the New Federal Rules

Update as of April 2014

# Background Information

- Technologist
- Lawyer
- Entrepreneur
- Document Review Staffing
- E-Discovery Educator

# Primary Tensions in 2013-14

- Overly Broad Preservation
  - Microsoft Letter
  - Hubbard Analysis
- Fear of Sanctions for Spoliation or Poor Preservation Process
  - Uneven Standards across federal jurisdictions
- Concern with Discovery Costs and litigation delays in general



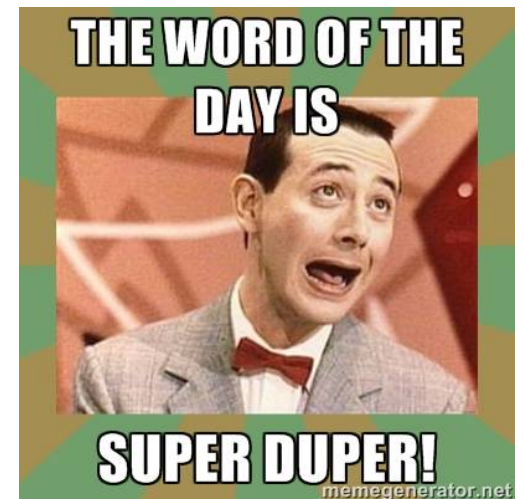
# Road Map

- Several years of think tank meetings – 2010 Conference on Civil Litigation “Duke Conference” kicked it off
- Draft Rules created and debated by blue ribbon panels and Rules Subcommittees.
- 2300 Public Comments filed in response.
- 120 Witnesses testified.
- Substantial Impact on Proposed Rules as they stand right now.
- April 10 – 11 Meeting in Portland by the Rules Committee:



# Primary Significant Changes

- Rule 26(b)(1), the Scope of E-Discovery and **Proportionality** moves front and center.
- Limitations which were considered for depositions, interrogatories and requests for admissions are now removed BUT the court can consider limitations based on **proportionality** concerns.



# Preservation Planning

- Rules 26(f) and 16(b) are to be modified to require proper identification of open preservation issues involving ESI in discovery plans & their resolution in scheduling orders.
- Rule 37(e) comments recognize a duty to preserve discoverable information may arise before an action is filed.

# New Proposed Safe Harbor - Rule 37e

- Initial 37(e) in 2006 adopted to prevent the imposition of sanctions ESI losses due to “routine, good faith” operation of information systems.
- ~~Initial Rule Change authorized sanctions for failures to preserve only if they caused substantial prejudice in the litigation and were the result of “willful or bad faith” conduct or involved failures to preserve which “irreparably deprived” a party of a “meaningful” ability to present or defend against a claims in the litigation.~~



# New Proposed Safe Harbor – Rule 37(e)

- Attempts to limit the scope of sanctions from the least onerous outward.
- Tried to give the trial court discretion on sanctions.
- “Squishy Line” between Curative and Intent Sanctions.
- Reduced the efforts to reign in over preservation.
- Confined efforts to ESI and not documents or “tangible” property.
- Took aim at simple negligence standard in 2<sup>nd</sup> Circuit from Residential Funding line of cases.



# New Proposed Safe Harbor-Rule 37 (e)

- No clarity in Comments on what the 4 factors to be considered are there for –if there for planning for preservation or for retrospective evaluation by courts.
- May expand preservation under **proportionality** needs of the litigation. No categories with presumptive limitations like in District of Delaware Default Standards and the 7<sup>th</sup> Circuit E-Discovery Pilot Program.

# Areas of Tweaking - Cooperation

- Rule 1 – [the rules will be] construed, ~~and~~ administered **and employed by the court and parties** to secure the just, speedy, and inexpensive determination of every action and proceeding.”
  - Pushing cooperation theme without explicitly saying cooperation.

# Speed – Scheduling Order

- Rule 16b - Reduced from 120 days to 90 days
  - but comments and testimony indicate wide discretion to give additional time to allow for meet and confers and better cooperation.

# Cost Allocation (Rule 26(c))

- General rule has been each party bears costs of selection, review and production of discoverable information.
- 26(b)(2)(B) 2006 amendments can cost-shift when seeking discovery from inaccessible sources.
- Proposed 26(c)(1) if protective order in place to protect against **undue burden or expense**, the court can order discovery with an allocation for expenses.

# Impact – More Fertile Ground for Lawyers to Argue

- Not much thought on how technology will help to solve the problems and the challenges which using technology will no doubt create.



# What are we Getting?



# Additional Sources of E-Discovery Information

- Local Friends of E-Discovery Chapter. [www.friendsofediscovery.com](http://www.friendsofediscovery.com) or get on email list by contacting [kas@reviewless.com](mailto:kas@reviewless.com).
- [www.ESIBytes.com](http://www.ESIBytes.com). Free podcasts on e-discovery.
- Friends of E-Discovery Judicial Roundtable on June 5<sup>th</sup> at lunch time. 7 Judges on a panel discussing e-discovery issues including the new federal rules.