

Client Alert

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New Federal Rules Aim to Promote Proportionality in Discovery

On April 29, 2015, the US Supreme Court adopted proposed amendments to the Federal Rules of Civil Procedure (FRCP) that aim to inject proportionality into the discovery process, require parties to be transparent and cooperative in their discovery responses, and increase active case management of discovery by the judiciary. Absent legislation by Congress to reject, modify or deter these amendments, they will become effective December 1, 2015. These amendments will be the most sweeping reform to discovery obligations captured in the FRCP since 2006.

Textual changes to Rule 1 reflect that “[t]he rules should be construed, administered and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action.” This amendment intends to emphasize that litigating parties share the responsibility with the court to achieve a conclusion that is fair, quick and relatively inexpensive. It is anticipated that courts will expect lawyers and parties to cooperate and refrain from misuse of discovery tools that increase cost and delay the proceedings.

Changes to Rule 4 shorten the presumptive time to serve a defendant with a summons from 120 days to 90 days. In Rule 16, timeframes for issuing a scheduling order have also been shortened by 30 days. More importantly, changes to Rule 16(b) permit a court to provide a scheduling order governing ESI preservation issues. Although Rule 16(b) is permissive, it is expected that courts will use this amendment to deal with ESI issues early on in a case.

For litigants who have long struggled with immense bills associated with responding to discovery, or have suffered at the receiving end of “discovery about discovery,” changes to Rule 26 now impose a requirement of proportionality on discovery requests. The new text of Rule 26(b)(2)(1) states: “Parties may obtain discovery 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.” While it is uncertain how the proportionality requirement will be practically applied by courts, the inclusion of proportionality factors into the main text of the rule reinforces Rule 26(g)’s obligation that parties consider proportionality when making discovery requests, responses or objections. It also rearranges the order of considerations to be balanced. In addition, the Committee Notes now provide that parties should consider reliable technology as a means to reduce costs in cases involving large volumes of electronic information. Presumptively, courts will encourage the use of technology-assisted review and other analytical measures to reduce discovery burdens.

The new text to 26(b)(1) removes two prior loopholes that allowed for vast fishing expeditions:

- Obtaining discovery about “the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identify and location of any persons who know of any discoverable matter” has been taken away. The removal of this language aims to eliminate gamesmanship in “discovery about discovery.”

- In addition, removal of the following sentences aims to focus discovery on the evidence that is central and requests that are proportional to the case: “For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.”

Rule 34(b)(2) will now put an onus on the parties to respond to discovery requests with specificity as to any grounds for objecting to a request, including the reasons and whether any responsive materials are being withheld on the basis of an objection. No longer will parties be allowed to respond to a discovery request with boilerplate objections, which, according to the Committee Note, left requesting parties “uncertain whether any relevant and responsive information has been withheld on the basis of the objections.” Ostensibly, this may require a party employing searching limitations to identify responsive or relevant materials to now provide a narrative accounting such steps in the response to the discovery request to qualify that some materials have been “withheld.” These changes will pressure responding parties to work quickly to assess their electronic information and to accurately state whether responsive information exists and whether any of it will be withheld.

Rule 37(e), in its current form, attempted to standardize sanctions for discovery violations by providing a “safe harbor” for certain types of electronic information preservation failures. However, in practice it left the courts open to interpret culpability without consistency or uniformity. It also failed to provide a significant measure of comfort to companies with large volumes of data that struggled to find the right balance of preservation to meet legal hold obligations, contributing to over-preservation.

To rectify these inconsistent rulings, new Rule 37(e) replaces the prior rule in its entirety and attempts to provide a uniform approach to the spoliation/sanctions analysis for electronic information. New Rule 37(e) states that a failure to preserve electronic information that should have been preserved in anticipation of litigation but “is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced:”

- (1) upon finding prejudice from loss of information may order measures no greater than necessary to cure prejudice, or
- (2) upon finding party acted with intent to deprive other party of use of information:
 - (a) Presume lost information was unfavorable to the party;
 - (b) Instruct jury it may or must presume information was unfavorable to party; or
 - (c) Dismiss action or enter default judgment.

This rule will enforce a three-factor test for determining when sanctions under FRCP will apply. It specifically provides the types of remedy available dependent on whether the party had an “intent to deprive,” and severe sanctions are reserved for situations where a party acted with intent to deprive its opponent from use of the electronic information. Notably, this rule is limited to losses of electronic information only, not hard copy documents or tangible items. It also forecloses reliance on inherent authority or state law to determine when certain measures should be used.

The Rules Advisory Committee hopes that the Rule 37 changes will aid parties who take “reasonable steps” to preserve relevant information from spoliation sanctions, so that over time, parties will gain confidence that the rule will discourage unfair allegations of preservation misconduct. As a result, this should simultaneously promote compliance and reduce unnecessary over-preservation. Importantly, the Committee noted that the rule does not call for perfection — only reasonable preservation behavior, and proportionality is part of the calculus of reasonableness.

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