AN EARLY CHRISTMAS PRESENT?

Amendments to the Federal Rules of Civil Procedure, effective Dec. 1, 2015

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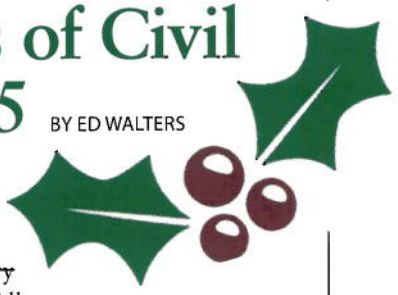

With the aspirational goal of "reining in the excessive cost of discovery," the United States Supreme Court has approved several changes to the Federal Rules of Civil Procedure, which become effective Dec. 1, 2015. These changes are significant—some more than others.

Rule 26 and "proportionality"

One of the most far-reaching changes relates to the scope of discovery under Rule 26(b)(1) by replacing the requirement that discovery be "relevant to any party's claims or defense" with a "proportionality" factor that incorporates the language in old Rule 26(b)(2)(C) and moves it up in priority and importance.

Significantly, the language, "Relevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence" was replaced with: "Information within the scope of discovery need not be admissible in evidence to be discoverable," thus totally getting rid of the phrase "reasonably calculated to lead to the discovery of admissible evidence." Previously, the "reasonably calculated" phrase had been moved to a less prominent place, and now it has been removed from the rule entirely. Removing the "reasonably calculated" phrase will make a difference in how parties justify the discovery that they are seeking.

The entire text of the rule has been changed as follows: (Strikeouts are the old language.)

(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. ~~including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. 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 the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).~~

Under the amended rules, discovery now hinges on a single key concept: proportionality. Amended Rule 26 adds language stating that a party is entitled to discovery that is relevant to claims and defenses and "proportional to the needs of the case." The scope of discovery now incorporates six factors that should be considered to determine whether a discovery request is proportional to the needs of the case. They include

1. the importance of the issues at stake in the action,
2. the amount in controversy,
3. the parties' relative access to relevant information,
4. the parties' resources,
5. the importance of the discovery in resolving the issues, and
6. whether the burden or expense of the proposed discovery outweighs its likely benefit.

The first consideration in the amended rule is the importance of the issues at stake in the action. This rearrangement adds prominence to the importance of the issues and avoids any implication that the amount in controversy is the most important concern. The committee notes state that the change to Rule 26 "does not change the existing responsibilities of the court and the parties to consider proportionality," and the drafters did not intend for proportionality to be used as a weapon.

Who has the burden of proof on these issues?

This change will shift the burden of proving proportionality to the party seeking discovery. As a result, will it provide a new basis for refusing to provide discovery, and, of course, increase litigation costs? Only time will tell if these will be unintended consequences.

It seems clear that the next battles looming for our judges and magistrate judges will be proportionality objections, proportionality hearings, proportionality witnesses, and, thus, mini-proportionality trials with one side claiming the information is disproportionate and burdensome, and the requesting party having the burden of proving otherwise.

A motion to compel the production likely will result in an evidentiary hearing. One counsel will bring witnesses to testify at the hearing about the burden and

cost of producing the requested materials. The requesting counsel must be ready to counter these witnesses with its own witnesses.

Unfortunately, the requesting party almost certainly will need to conduct discovery on the other party's proportionality claims to effectively counter them.

Issues will arise as to whether the "resources" refer to those of the client or the resources of the lawyer. The rule states that "the parties' resources" should be used in the proportionality analysis, and nowhere is the resources of the parties' counsel mentioned.

These issues are now front and center.

Rules 4 and 16: Shortening the timeline

The amended rules also shorten the deadlines in early case management. Prior Rule 4 required that the summons and complaint be served within 120 days. That time period has been shortened to 90 days.

Revised Rule 16 now requires a scheduling order 30 days earlier, as well. Changes to Rule 16(b)(2) reduce the time for issuance of the scheduling order from 120 days to 90 days after a defendant has been served, or from 90 days after any defendant has appeared.

Further, Rule 16(b)(3)(B)(v) was created to specify that a scheduling order may direct that before moving for an order relating to discovery, the movant must request a conference with the court:

(b) SCHEDULING.

(1) *Scheduling Order.* Except in categories of actions exempted by local rule, the district judge—or a magistrate judge when authorized by local rule—must issue a scheduling order:

(A) after receiving the parties' report under Rule 26(f); or

(B) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference.

(2) *Time to Issue.* The judge must issue the scheduling order as soon as practicable, but unless the judge finds good cause for delay, the judge must issue it within the earlier of 90 days after any defendant has been served with the complaint or 60 days after any defendant has appeared.

(B) *Permitted Contents.* The scheduling order may:

(i) modify the timing of disclosures under Rules 26(a) and 26(e)(1);

(ii) modify the extent of discovery;

(iii) provide for disclosure, ~~or~~ discovery, or preservation of electronically stored information;

(iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under Federal Rule of Evidence 502;

(v) direct that before moving for an order relating to discovery, the movant must request a conference with the court;

(vi) set dates for pretrial conferences and for trial; and

(vii) include other appropriate matters.

The new rule institutes a procedure whereby the court has the option of ordering that parties request a conference before filing a motion to compel, designed to decrease the time, effort, and expense of discovery motions.

Rule 37 and ESI

Significant changes to Rule 37 were made in order to address issues relating to preserving electronically stored information.

Revised Rule 37 seeks to provide the remedies a court may take when it determines that certain information that should have been preserved is lost. It does not *create* a duty to preserve, but yields to the duty already imposed by case law that a preservation obligation is created when litigation is reasonably anticipated.

Rule 37(e)(2) provides the court with a nonexhaustive list of measures and sanctions:

(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.

Rule 37(b)(1)(B) allows limited sanctions only where a party's actions either (1) caused substantial prejudice and were willful or in bad faith, or (2) irreparably deprived a part of a meaningful opportunity to present or defend against the claims made in the litigation.

Other changes of note

Rule 26(d)(2) allows a party to serve a Rule 34 document production request prior to the Rule 26(f) meeting. The date of service, however, is calculated as the date of the first 26(f) meeting.

Rule 26(C)(1) provides that a protective order may specify "the terms, including time and place *or the allocation of expenses*, for the disclosure of discovery."

Rule 34(b)(2)(B) indicates that while an objection may be raised as to the broad nature of a discovery request, the objection must state which part of the request is not overbroad, if a portion of the request is appropriate.

Rule 34(b)(2)(B) also allows a responding party to state that it will produce copies of documents or ESI in lieu of permitting inspection.

Rule 34(b)(2)(C) currently requires that an objection to a request must specify the part and allow the inspection of the remainder. The amendment requires that the objection "must state whether any responsive materials are being withheld on the basis of that objection."

(B) *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state with specificity the grounds for objecting to the request, including the reasons. The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.

(C) *Objections.* An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest.

Many changes in Rules 30, 31 and 33 were made to change references to "Rule 26(b)(2)" to read "Rule 26(b)(1) & (2)." The amended rules also contain copies of certain forms approved by the Supreme Court.

Conclusion

These rules attempt to achieve the goal of the "just, speedy, and inexpensive determination of every action and proceeding." While they significantly expedite the timing of the early stages of litigation, bring clarity to many facets of discovery, and redefine a party's ESI obligations, only time will tell whether these changes expedite matters or whether the mini-trials regarding proportionality of discovery will work in the opposite direction.

Consult the actual text of these changes and annotate your Federal Rules of Civil Procedure book that's sitting on your shelf (or should be). The 2016 version won't hit your desk for a while. For the complete text of the changes: *http://www.supremecourt.gov/orders/courtorders/frcv15(update)_1823.pdf*. For a list of all of the Federal Rules: *https://www.law.cornell.edu/rules/frcp*.