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Federal Court Practice Advisory: Amended Federal Rules Emphasize Proportionality and Clarify Sanctions for E-Discovery Spoliation

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Client Advisory

In April 2015, the U.S. Supreme Court submitted proposed amendments to the Federal Rules of Civil Procedure to Congress, and such amendments will go into effect on December 1, 2015 unless Congress rejects, modifies, or defers them. The rule changes, developed by the Advisory Committee on the Federal Rules of Civil Procedure, emphasize proportionality and reasonableness in connection with discovery and seek to promote cooperation through more active judicial case management. In addition, the amendments provide uniformity as to the sanctions available for the loss of electronically stored information ("ESI"), which has been an issue of disagreement among the circuit courts. The discovery-related amendments address issues caused by the explosion of electronic discovery, which has become an expensive and burdensome obstacle to the efficient adjudication of cases on their merits, and the hope is that these amendments will help parties and courts to better manage discovery issues. The following is a brief summary of some of the proposed amendments.

Scope of Discovery: Proportionality

Rule 26(b)(1) defines the scope and limits of discovery. While the fundamental requirement of relevance remains, the amended version additionally requires that the discovery be "proportional to the needs of the case." Proportionality will be assessed based on 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." The amended version also removes the language "reasonably calculated to lead to the discovery of admissible evidence," which has at times led to an unreasonably expansive interpretation of what is discoverable.

Proportionality is not a new concept; much of the proportionality language found in the amended Rule 26(b)(1) is currently in Rule 26(b)(2)(C)(iii), which relates to the court's ability to limit the frequency and extent of discovery if the burden or expense outweighs the likely benefit. The practical effect of the amendment is to make proportionality a part of the definition of the scope of discovery, creating a statutory obligation for the parties to consider proportionality in drafting their requests and responses at the outset of discovery. The amended rule reinforces the increasing judicial focus on proportionality to limit overbroad discovery, and provides the courts additional authority to consider and enforce proportionality. It may, however, lead to increased litigation at the outset, with responding parties aggressively objecting to discovery requests and insisting that parties explain how certain discovery is proportional to the needs of the case.

Early Case Management

The amended version of Rule 1 emphasizes that "the parties"—not just the court—have an obligation "to secure the just, speedy, and inexpensive" resolution of actions. Consistent with the goal of reducing delay, the amended version of Rule 4(m) reduces the time for plaintiffs to serve a defendant with a complaint from 120 to 90 days after it is filed, and the amended version of Rule 16(b)(2) similarly reduces the time for judges to issue scheduling orders by 30 days.

The amendment to Rule 16(b)(3) expands the "permitted contents" of a scheduling order to include provisions for the preservation of ESI and agreements under Federal Rule of Evidence 502 relating to the clawback of inadvertently disclosed privileged documents.

Responses to Discovery Requests: Greater Specificity

Several amendments to Rule 34(b) significantly alter the obligations of parties responding to discovery requests. The amended rule will require the objecting party to specify the grounds and reasons for an objection to a request. Boilerplate objections, such as stating simply that the request is "unduly burdensome" or "vague," will no longer suffice. Rather, the objecting party will be required to specify *why* or *how* the request is unduly burdensome or vague.

Further, the amendment requires the objecting party to state whether any materials will be withheld on the basis of the objection. In addition, the responding party must specify a reasonable date of production if production is contemplated after the date indicated by the requesting party.

The intent of these amendments is to discourage drawn-out, expensive gamesmanship in discovery practice. Although amended Rule 34(b) may increase the initial burden and costs associated with responding to discovery requests, the hope is that it will lead to less delay, more transparency, and a decrease in costly discovery disputes.

Sanctions for the Failure to Preserve ESI

The amendments to Rule 37(e) codify the showing required for sanctions for failure to preserve ESI and settle a circuit split regarding when certain serious sanctions can be awarded. The party seeking sanctions must show that (i) the lost ESI was relevant and "should have been preserved in the anticipation or conduct of litigation," (ii) the party "failed to take reasonable steps to preserve" the ESI, and (iii) the lost ESI "cannot be restored or replaced through additional discovery." If this showing is made, then the court must find that the party is prejudiced by the lost ESI and "may order measures no greater than necessary to cure the prejudice." If the court finds that a party "acted with intent to deprive another party" of the ESI, prejudice to the other party is presumed, and the court may impose severe sanctions, such as a presumption that the lost information was unfavorable to the party responsible (such as an adverse inference jury instruction), dismissal of the action, or entry of a default judgment.

There a few important practical implications associated with amended Rule 37(e). First, it reflects a recognition that the obligation to preserve documents (especially ESI) can be very expensive and burdensome, and reinforces the reasonableness standard emphasized by many courts. Parties are not expected to be perfect in their preservation of ESI, but they must take "reasonable steps to preserve" when the obligation arises (typically, when there is notice of litigation or it is reasonably anticipated).

Second, the amended rule clarifies that the most severe sanctions—an adverse inference instruction, dismissal, or a default judgment—may only be imposed if a party intentionally causes ESI to be lost in order to deprive another party of the information (which essentially requires a finding of bad faith). Some circuits, including the Second Circuit, have permitted adverse inference instructions for mere negligence in failing to preserve ESI. *See, e.g., Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99 (2d Cir. 2002). The amended rule creates consistency among the federal courts, and ensures that negligent loss of ESI will result only in those measures "necessary to cure the prejudice" to the other party.

Conclusion

The amendments to the Federal Rules of Civil Procedure will no doubt change aspects of federal litigation practice. Time will tell, however, if these amendments have the desired effect of reducing discovery costs, increasing the efficiency of the litigation process, and removing obstacles to the adjudication of cases on their merits. For now, parties should be familiar with the changes and their practical implications prior to their being effective, and should consult counsel for further information. The text of the amendments can be found at http://www.uscourts.gov/rules-policies/pending-rules-amendments.

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