The 2015 Amendments to the Federal Rules of Civil Procedure

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The New Rules Address 4 Major Topics

- Rules 1, 4(m), 16(b) and 26(f) – Cooperation and Active Case Management
- Rules 26(b)(1) and 26(c)(1) – Proportionality and Allocation of Expenses
- Rules 26(d)(2) and 34(b)(2) – Early Requests for Production and Responses and Objections
- Rule 37(e) – Curative Measures and Remedies for Loss of ESI

New Rule 1

Scope and Purpose. These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed, administered, **and employed by the court and the parties** to secure the just, speedy, and inexpensive determination of every action and proceeding.

- There is now an explicit reference to "cooperation" in the Advisory Committee Note to Rule 1.

Tightening Up of Certain Timeframes

- **New Rule 4(m):** Time to serve summons on defendant is reduced from **120** to **90** days after the complaint is filed

- **New Rule 16(b)(2)**: Time to issue the scheduling order is reduced from **120** to **90** days after defendant is served, or from **90** to **60** days after defendant appears

New Rule 16(b)(1)(B)

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 ~~or by telephone, mail, or other means~~.

New Rule 16(b)(3)(B)

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

(iii) provide for disclosure, 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;

New Rule 26(f)(3)

Discovery Plan. A discovery plan must state the parties' views and proposals on: * * *

(C) any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including – if the parties agree on a procedure to assert these claims after production – whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502;

New Rule 26(b)(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.

What Has Changed?
The Scope of Discovery Is Narrowed.

- "Subject matter" discovery is eliminated entirely and the "reasonably calculated" language is removed and clarified

- Proportionality factors are moved from Rule 26(b)(2)(C) into Rule 26(b)(1), reordered (*i.e.*, "the importance of the issues at stake in the action" is moved to first in the list), and a new factor is added (*i.e.*, "the parties relative access to information")

New Rule 26(c)(1)(B)

1) ***In General***. * * * The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: * * *

(B) specifying terms, including time and place **or the allocation of expenses**, for the disclosure or discovery; * * *

New Rule 26(d)(2)

(2) Early Rule 34 Requests.

(A) Time to Deliver. More than 21 days after the summons and complaint are served on a party, a request under Rule 34 may be delivered:

(i) to that party by any other party, and

(ii) by that party to any plaintiff or to any other party that has been served.

(B) When Considered Served. The request is considered as to have been served at the first Rule 26(f) conference.

New Rules 34(b)(2)(B) and (b)(2)(C)

(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 stated in the request or another reasonable time stated 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. * * *

Purposes of the Amendments to Rule 34(b)

- Avoid boilerplate objections
- Avoid responses that fail to indicate whether the producing party is withholding any documents
- Avoid responses that fail to indicate when the producing party will provide responsive documents

New Rule 37(e)

37(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.

Reflections on New Rule 37(e)

- Applies only to the loss of ESI, not to hard-copy or tangible things
- Defers to common law on the trigger and the scope of a party's preservation obligations
- Applies only if a party "failed to take reasonable steps to preserve" ESI
- Applies only when lost ESI "cannot be restored or replaced through additional discovery"

Reflections on New Rule 37(e) (Cont'd)

- Does not use the words "sanction" or "spoliation"
- Forecloses court's use of its inherent power (or state law) to sanction, but does not restrict court's case management powers under Rules 16 or 26
- Requires a finding of prejudice unless there is an "intent to deprive another party of the information's use" in litigation
- Limits curative measures to those "no greater than necessary to cure the prejudice" (*e.g.*, additional discovery, fines, cost-shifting, evidence preclusion, and allowing parties to present evidence or argument to jury regarding the loss)

Open Issues With Respect to New Rule 37(e)

The new rule is certainly an improvement, but a few issues remain:

- Reasonableness. The phrase "lost because a party failed to take reasonable steps to preserve" is ambiguous. Different judges are bound to have different views on what steps are "reasonable," leaving the baseline applicability of the rule unclear.
- Burden of Proof. Under both subsections (1) and (2), the new rule is silent as to burden of proof. Does the party claiming prejudice have to establish its existence, or does the spoliating party have to prove lack of prejudice? Likewise, does intent to deprive need to be proven by the aggrieved party or disproven by the spoliating party?
- Adverse Inference Instructions. Some argue that adverse inference instructions can be remedial – *i.e.*, their purpose is to recalibrate the jury's view of the evidence, not to punish the spoliating party. Are such instructions still available under the new rule?