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Catch up with the amendments to the federal rules

By Neda Shakoori

On Dec. 1, amendments to the Federal Rules of Civil Procedure took effect. FRCP Rules 16, 26, 34 and 37 relate to pretrial matters and discovery. These changes should increase cooperation between parties, expedite discovery, and encourage parties to think seriously about preservation obligations. For these amendments, results may be achieved via: (1) abbreviated pretrial conference scheduling and management, (2) proportional discovery, (3) discouraging objections to discovery requests, (4) requiring specific objections to discovery requests, and (5) imposing curative measures on parties failing to preserve electronically stored information (ESI).

Rule 16

Pretrial conferences. One amendment eliminates the option of participating in pretrial scheduling conferences via mail or other means. When issuing a scheduling order, the judge now must do so "after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference." Rule 16(b) (1)(B). The committee note says scheduling conferences are "more effective if the court and the parties engage in direct simultaneous communication." This can be achieved through an in-person scheduling conference, or one conducted by telephone or other "sophisticated electronic means."

Timing of the scheduling order. Rule 16(b)(2) now says a scheduling order must be issued within the earlier of 90 days (versus 120 days) after any defendant has been served with the complaint, or 60 days (versus 90 days) after any defendant has appeared. This should reduce delays at the outset of litigation. With that in mind, the rule provides for an extension of these deadlines if a court finds "good cause," which may be found when, given the circumstances, the parties are not able to adequately prepare for a scheduling conference. Factors inhibiting preparation may include number of parties, complexity of issues, and cases involving large organizations.

Contents of the order. Rule 16(b)(3) (B) relates to the content permitted within a scheduling order. Three separate amendments were inserted. The subdivision now states that the scheduling order may: (1) "provide for disclosure, discovery, *or preservation*" of ESI; (2) may include agreements reached by the parties "for asserting claims of privilege or protection as trial-preparation material after information is produced, *including agreements reached under Federal Rule of Evidence 502*;" and (3) include a requirement that prior to bringing a discovery motion, "*the movant must request a conference with the court*," which the court, in its discretion, will either grant or deny. The committee note states pre-motion conferences are an efficient method of resolving discovery disputes, especially considering the delays and burdens associated with formal discovery motion practice.

Rule 26

Discovery scope and limits. The rule previously had an arguably broad reach relative to the scope of discovery. It now allows for discovery regarding any nonprivileged matter relevant to a party's claim or defense and which is "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." Rule 26(b)(1). Proportionality considerations are viewed as the "collective responsibility" of the parties and the court.

The focus on proportionality should prove beneficial to all parties. It will mean more streamlined and focused discovery, which means a decrease in the expenditure of time and money.

Limitations on frequency and extent. Under Rule 26(b)(2)(C), courts must limit the frequency or extent of discovery based on several determinations. One such determination, subsection (iii), has been amended to mirror the limitations in amended Rule 26(b)(1).

Protective orders. Under Rule 26(c), protective orders may be issued to accomplish a variety of goals, one of which relates to the allocation of discovery expenses. Subsection (c)(1)(B) permits inclusion of a provision specifying allocation of expenses relative to disclosures or discovery. Discovery-related expenses are often a point of contention, so inclusion of a cost allocation provision within an order should reduce disputes.

Timing and sequence of discovery. Rule 26(d) was amended to include new subsection (2) on the timing of the delivery of a Rule 34 discovery request. While not considered served until the Rule 26(f) conference, the Rule 34 requests can be sent to a party 21 days or more after the summons and complaint have been served. This amendment is another direct method of fast-tracking the discovery process and is meant to "facilitate focused discussion during the Rule 26(f) conference." Former subsection (2) of Rule 26(d) is now subsection (3), and is amended to allow parties to stipulate to case-specific discovery sequences.

Conference of the parties. Rule 26(f) has been amended to mirror the amendments in Rule 16(b)(3) relating to preservation of ESI and court orders under Federal Rule of Evidence 502.

Rule 34

The amendments to Rule 34 are intended to reduce "the potential to impose unreasonable burdens by objections to requests to produce" as well as to clear up any confusion in regard to whether responsive documents have been withheld. The amendments require: (1) specifically stated objections to requests for production, (2) responses which state that documents or ESI will be produced (as opposed to inspected) and by a date certain, and (3) objections to state whether responsive documents or ESI are being withheld on the basis of an objection. Rule 34 has also been amended in conjunction with Rule 26 to allow requests for production to be sent before the Rule 26(f) conference.

Rule 37

Motion for an order compelling disclosure or discovery. Rule 37(a)(3) (B)(iv) now includes language regarding the failure to produce documents, as opposed to just the failure to respond that an inspection will be permitted.

Failure to preserve ESI. Rule 37(e), applicable to ESI only, now authorizes and specifies "measures a court may employ if information that should have been preserved is lost, and specifies findings necessary to justify these measures." The amendments essentially state that if ESI that should have been preserved is lost as a result of a failure to take reasonable steps to preserve, and the ESI cannot be restored or replaced via other means, a court may: (1) order measures to cure any prejudice imposed on another party, (2) provide a jury with an adverse inference instruction, or (3) dismiss the case or enter a default judgment.

Counsel should review the full committee notes for not only the rules discussed here, but all amended rules. The notes provide numerous insights, as well as useful commentary on the practical application and anticipated outcomes of the amendments.

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