LARSON • KING | LITIGATION REDEFINED

Anthony J. Novak
Umut Ozturk

Important Changes to Federal Rules of Civil Procedure

On December 1, 2015, a number of key amendments to the Federal Rules of Civil Procedure took effect. The proposed amendments were reviewed, approved and submitted to Congress, by the U.S. Supreme Court, on April 29, 2015.[i] The amendments are focused on reducing litigation cost by expediting both the discovery process and the litigation process itself.

The amendments, which arguably entail the most significant alterations to the discovery rules in more than two decades, will "govern in all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings then pending."[ii] The practical effect of these amendments will require at least some change to three important aspects of discovery: speed, specificity/scope, and handling and assessing claims of lost electronically store information. The amendments are outlined at the bottom of this discussion, with several key items highlighted below.

Increased Speed of Litigation

First, through amendment to Rule 16, the court will have thirty less days to issue a scheduling order.[iii] This means that the parties will have to hold their Rule 26(f) conference and provide their Rule 26(f) report to the court almost a month sooner than required under the previous Rules.[iv] This change leads to additional time pressure for all parties involved. This could also result in parties issuing requests for production of documents as early as twenty-two days after service of the complaint.[v] Such a request for production will be considered "served" as of the Rule 26(f) conference, with responses due within 30 days of the conference.

Increased Specificity / Limit on Scope

Second, Rule 26 is amended to specifically address discovery proportionality. This will likely be a tool used by litigants to limit over-broad discovery requests, particularly in claims with comparatively smaller value. As amended Rule 26(b)(1) will read:[vi]

> 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

Larson • King, LLP
30 East Seventh Street | Suite 2800 | Saint Paul, MN 55101
Main: (651) 312-6500 | Toll Free: (877) 373-5501 | Fax: (651) 312-6618

> 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 to be evidence to be discoverable.

The notes accompanying revisions to Rule 26 state that the change "restores the proportionality factors to their original place in defining the scope of discovery reinforces the Rule 26(g) obligation of parties to consider [proportionality] factors in making discovery requests responses or objections."[vii]

Under the amended Rule 26(b)(1), the relevant considerations in determining whether discovery is proportional to the needs of the case (which are likely to be highlighted in responding to motions to compel over-broad discovery) include: [viii]

- The importance of the issues at stake;
- The amount in controversy;
- The parties' relative access to relevant information;
- The parties' resources;
- The importance of discovery in resolving the issues; and
- Whether the burden or expense outweighs its likely benefit.

In assessing the next key amendment, this one to Rule 34, a spotlight has been placed on specificity in a responding party's objections and answers to a request for production. A responding party must object "with specificity" and "state whether any responsive materials are being withheld on the basis of that objection."[ix] The response must be sufficient to "alert other parties to the fact that documents have been withheld and thereby facilitate an informed discussion of the objection."[x]

Electronically Stored Information

The preservation and production of electronically stored information (ESI) has become a major cost (both in terms of dollars and administrative resources) in most types of litigation. The amendments should relieve some of that burden, particularly in those cases that don't warrant such expenditure. The first relevant amendment is, of course, the proportionality language addition to Rule 26.

Larson • King, LLP
30 East Seventh Street | Suite 2800 | Saint Paul, MN 55101
Main: (651) 312-6500 | Toll Free: (877) 373-5501 | Fax: (651) 312-6618

Next, the amendments include the deletion of the phrase "reasonably calculated to lead to the discovery of admissible evidence" from Rule 26's description of the scope of discovery. The Advisory Committee has pointed out, this "phrase has been used by some, incorrectly, to define the scope of discovery" and has resulted in engulfing other limitations on the appropriate scope.[xi] Rule 26 in its current version, will properly describe the scope of discovery as information that is "relevant to any party's claim or defense and proportional to the needs of the case."[xii] This will be useful language in both discovery generally, as well as the preservation and production of ESI.

Next, in addressing the issue of "lost ESI," the amendment institutes a "uniform standard" in Rule 37(e) for addressing claims of lost ESI. Prior to the amendments, claims related to spoliation of evidence were held to different standards in different jurisdictions.[xiii] The new uniform standard will:

- Impose a "reasonableness" threshold: Sanctions or "curative" measures can be imposed only if the party failed to take reasonable steps to preserve ESI that should have been preserved in the anticipation or conduct of litigation; and
- Require a finding of prejudice or bad faith: The amended rule recognizes that a party's failure to preserve ESI does not, by itself, show bad faith and does not inherently prejudice the opposing party. "Curative" measures can be imposed only upon a finding of prejudice and only as sufficient to "cure" the prejudice. Proscribed sanctions can be imposed only upon a finding of intent to deprive another party of the lost ESI's use in the litigation.[xiv]

Particularly, the Advisory Committee proposed the Rule 37(e) amendments for the explicit purpose of addressing the problem of over-preservation by parties in or anticipating litigation.[xv] The reasoning of the Advisory Committee with respect to amended Rule 37 provides a clear signal that over-preservation is not a requirement.

Federal Rules of Civil Procedure, 2015 Amendments:

- **Rule 1** is amended to emphasize that both the court and the parties have responsibilities to promote a "just, speedy and inexpensive" resolution to every case. The amendment seeks to foster a spirit of cooperation and leaves no doubt that it is the responsibility of the parties, as well as the courts, to achieve just, speedy and inexpensive

resolutions to litigation.[xvi]

- **Rule 16** is amended:
    1. To provide that if a scheduling order is not issued based upon the report of the parties' Rule 26(f) conference, then the court must hold a scheduling conference by means of immediate communication, which does not involve written exchange by all parties involved.[xvii]
    2. Scheduling order must be issued 90 days after service of the complaint to the defendant or 60 days after a defendant has appeared.[xviii]
    3. To unequivocally allow the inclusion of three items into the scheduling order:
       A. A preservation order;
       b. An agreement under Federal Rule of Evidence 502 ("Rule 502") regarding protection of privileged information; and
       c. A requirement that an informal court hearing be had before the filing of any discovery motions.[xix]
- **Rule 26** is amended:
    1. To clarify the appropriate scope of discovery – i.e., that information is discoverable if it is "relevant to any party's claim or defense and proportional to the needs of the case."[xx]
    2. As part of the aforementioned clarification, to delete of the phrase "reasonably calculated to lead to the discovery of admissible evidence."[xxi]
    3. To explicitly recognize that protective orders may allocate discovery costs.
    4. To permit parties to serve Rule 34 requests (requests for production or inspection) before a Rule 26(f) conference has been held, as early as 22 days after service of the complaint.[xxii]
    5. To add two items to be addressed in discovery plans: preservation issues and Rule 502 agreements.[xxiii]
- **Rule 34** is amended:
    1. To require that objections to Rule 34 requests be made with specificity.
    2. To require that the responding party state whether any responsive documents are being withheld based on objections.
    3. To clarify that a responding party can state that it will

produce documents or ESI in lieu of an inspection.
4. To require that any such production be completed no later than the time for inspection stated in the request or a later reasonable time stated in the response.[xxiv]

- **Rule 37** is amended to replace the existing Rule 37(e) with entirely new language designed to establish a uniform standard for dealing with ESI loss. Under the proposed amendments, the rule applies only if four initial elements are established:
    1. The ESI should have been preserved in the anticipation or conduct of litigation;
    2. A party failed to take reasonable steps to preserve the ESI;
    3. As a result, the ESI was lost; and
    4. The ESI could not be restored or replaced by additional discovery.[xxv]

- If those four elements are established, then
    1. Under Rule 37(e)(1), curative measures are appropriate if the ESI loss caused prejudice to another party. The court is given broad discretion to impose appropriate measures, but they must be "no greater than necessary to cure the prejudice."
    2. Under Rule 37(e)(2), certain proscribed sanctions are appropriate "only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation." (No prejudice is required.) In such a situation, the court may (a) presume the lost ESI was unfavorable, (b) give an adverse inference jury instruction, or (c) dismiss the action or enter a default judgment.

- The court retains discretion; the amended rule does not require a curative measure or sanction in any circumstance.[xxvi]

For more information, please contact Tony Novak (tnovak@larsonking.com) or Umut Ozturk (uozturk@larsonking.com).

Larson • King, LLP
30 East Seventh Street | Suite 2800 | Saint Paul, MN 55101
Main: (651) 312-6500 | Toll Free: (877) 373-5501 | Fax: (651) 312-6618

[i] The Supreme Court did so pursuant to its authority to promulgate the Rules under the Rules Enabling Act of 1934
[ii] Order (U.S. Apr. 29, 2015).
[iii] Compare (Existing) Rule 16(b)(2) with New Rule 16(b)(2).
[iv] (Existing) Rule 26(f)(1) and (2).
[v] Amended Rule 26(d)(2)(A).
[vi] Amended Rule 26(b)(1)
[vii] *Id*.
[viii] *Id*.
[ix] Amended Rule 34(b)(2)(B) and (C).
[x] Proposed Rule 34 Advisory Committee Note (Advisory Committee Memo, at 54).
[xi] Proposed Rule 26 Advisory Committee Note (Advisory Committee Memo, at 44). See also Advisory Committee Memo, at 9-10 (explaining original intent of language and elaborating on the misplaced reliance on this phrase by courts and parties to define the scope of discovery).
[xii] See Amended Rule 26(b)(1).
[xiii] Compare Aramburu v. Boeing Co., 112 F.3d 1398, 1407 (10th Cir. 1997) (adverse inference instructions must be predicated on bad faith) with Residential Funding Corp. v. DeGeorge Finan. Corp., 306 F.3d 99, 108 (2d Cir. 2002) (adverse inference instructions appropriate upon finding of negligence).
[xiv] See Amended Rule 37(e).
[xv] Advisory Committee Memo, at 18.
[xvi] Federal Rules of Civil Procedure Ediscovery Guide: Practical Analysis for Organizations and Legal Teams, Kroll Ontrack, at 7. See also, *Weisshaar, Jesse*, Amendments to Discovery Rules- How Will You Be Affected?
[xvii] Federal Rules of Civil Procedure Ediscovery Guide: Practical Analysis for Organizations and Legal Teams, Kroll Ontrack, at 11. See also, Weisshaar.
[xviii] *Id*.
[xix] *Id*.
[xx] *Id*.
[xxi] *Id*.
[xxii] *Id*.
[xxiii] *Id*.
[xxiv] Federal Rules of Civil Procedure Ediscovery Guide: Practical Analysis for Organizations and Legal Teams, Kroll Ontrack, at 26.
[xxv] The Advisory Committee points out that "[n]othing in the rule limits the court's powers under Rules 16 and 26 to authorize additional discovery. Orders under Rule 26(b)(2)(B) regarding discovery from sources that would ordinarily be considered inaccessible or under Rule 26(c)(1)(B) on allocation of expenses may be pertinent to solving such problems." Proposed Rule 37 Advisory Committee Note (Advisory Committee Memo, at 62).
[xxvi] Federal Rules of Civil Procedure Ediscovery Guide: Practical Analysis for Organizations and Legal Teams, Kroll Ontrack, at 28. See also, Weisshaar.

Larson • King, LLP
30 East Seventh Street | Suite 2800 | Saint Paul, MN 55101
Main: (651) 312-6500 | Toll Free: (877) 373-5501 | Fax: (651) 312-6618