What You Need to Know About the New Rules of Federal Court Practice

Nov 30 2015

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Important changes to the Federal Rules of Civil Procedure will take effect on December 1, 2015. From that date on, if you serve a federal complaint (or are served one), you will need to know the new rules or you could risk incurring greater litigation costs, if not also prejudicing your litigation position.

Many of the rules changes arise out of dissatisfaction with the increasing costs and complexities of federal discovery—especially identification, preservation and production of relevant emails and electronic data. Other changes are designed to force parties and the courts themselves to speed up the early phases of litigation. The proposed amendments reflect three overlapping themes: (1) proportionality in discovery; (2) active judicial case management; and (3) cooperation among litigants. The amendments likely to have the greatest impact and which reflect the most significant departure from current practice are addressed below.

Scope of Discovery – Rule 26
The amendments restore proportionality factors to their original place in defining the scope of discovery. The well-known but often-disputed standard of whether requested discovery is "reasonably calculated to lead to the discovery of admissible evidence" will no longer govern because its breadth has now all but swallowed other discovery limitations set forth in the rules. Instead, amended Rule 26(b)(1) will now state (language that is underlined represents the newly adopted language):

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.

The amended rule is significantly different from the prior version of Rule 26(b), under which a party which argued that proposed discovery "outweighs its likely benefit" had to bring a motion to limit the scope of production. In contrast, under the amended rule, the parties are required to consider proportionality factors in making discovery requests, responses or objections at the earliest stages of a lawsuit. In addition, the change is not "intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional." Instead, the parties and the court must consider the proportionality of discovery in resolving discovery disputes.

Allocation of Discovery-Related Expenses – Rule 26
Amended Rule 26(c)(1)(B) gives courts authority to issue orders "specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery." This enables courts to shift expenses to protect a party from undue burden or expense in responding to discovery. Although the Advisory Committee cautions that cost-shifting is not intended to become a common practice, these changes may likely deter overly-aggressive discovery requests, the costs of which cannot be justified.

Amendments to Reduce Delay – Rules 4, 16, 26
The time to serve a defendant under Rule 4 is reduced from 120 days to 90 days after the complaint is filed. The judge must issue the Rule 16 scheduling order within 90 days (instead of 120 days) after any defendant has been served with the complaint or 60 days (instead of 90 days) after any defendant has appeared.

Amended Rule 26(d)(2) will allow parties to serve document requests on another party 22 days after the other party has been served with the summons and complaint even though the parties have not yet held the required Rule 26(f) conference. Similarly, the defendant may serve a document request on the plaintiff or any other party that has been served, even before answering. The document request will be considered served as of the first Rule 26(f) conference and responses are due 30 days thereafter. This is a change from current practice which prohibits parties from serving discovery requests until after the Rule 26(f) conference. The change is designed to expedite the discovery process so that the parties will know at an earlier stage what discovery will be requested, allowing for earlier negotiations over the necessary scope of discovery.

Producing Documents – Rule 34
General or blanket objections regarding the scope of document production often lead to discovery disputes. Amended Rule 34(b)(2) requires a party objecting to a document request to state the objection with specificity. Objections must now state whether any responsive materials are being withheld. The purpose is to avoid the uncertainty that arises when a party objects to a request, yet states it will produce documents subject to the objection. In addition, document production must be completed no later than the time for inspection specified in the request or another reasonable time identified in the response.

Sanctions for Failure to Preserve Electronically-Stored Information (ESI) – Rule 37
Amended Rule 37(e) clarifies the proper standard courts should apply when determining whether to sanction parties who fail to preserve discoverable information. Sanctions include adverse instructions that permit or require a jury to presume that missing information is unfavorable to the party that failed to produce it or even dismissal of claims and default judgment. Given the high stakes of most federal lawsuits, litigation involving spoliation sanctions has continued to increase over the last several years, resulting in higher litigation costs.

Confusion often arose because some federal courts held that a party could be sanctioned based on ordinary negligence in failing to preserve documents, while other courts held that an adverse inference instruction was appropriate only if a party intentionally destroyed documents in bad faith for the purpose of hiding potentially damaging information. The amended rule adopts the less stringent standard for imposing sanctions and sets a uniform standard for federal courts across the country.

The revised rule applies only to electronically stored information (ESI) such as emails. The rule does not apply when documents are lost or deleted before a duty to preserve arises. As a result, organizations may be less inclined to incur substantial ESI preservation costs unless and until litigation is likely.

Conclusion
The amendments to the Federal Rules include significant changes from past practice. It remains to be seen how counsel adopt and how courts apply the new rules. At a minimum, the amendments are likely to expedite cases and will potentially offer greater certainty about the appropriate scope of discovery, which could help reduce the frequency of time-consuming and expensive discovery disputes.

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