Mark your calendars for upcoming changes to the Federal Rules of Civil Procedure

December 1, 2015 matters if you practice in federal court, especially for discovery matters

By Anne Marie Murphy and Celine Cutter

On December 1, 2015 major amendments to the Federal Rules of Civil Procedure will take effect. The amendments are possibly as important as any amendments since the rules were enacted in 1938. Don't be caught unaware.

The amendments place a strong emphasis on proportionality in discovery. Defense counsel will claim that foundational concepts of discovery that favor plaintiffs have been eliminated, however this is too dire a reading of the changes. Plaintiffs' counsel need to be *ready* and *informed*.

Most notably, the changes address e-discovery, preservation and production of documents, and sanctions for loss of electronic information.

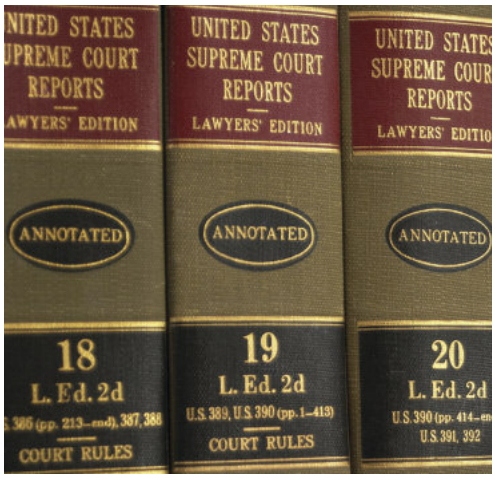
Courts are already preparing, and starting to look at discovery disputes under the guidelines.

Here are some of the major changes that will affect your discovery practice – it is important to note that some are plaintiff-friendly and others are open for interpretation.

Rule 16: Pretrial conferences, scheduling, and management

Rule 16 has been amended with the intent to reduce delays at the beginning of litigation and through discovery. This may be a welcome change to plaintiffs who want to move cases along and get into discovery quickly.

The Rule 16 amendments reduce the time to issue the scheduling order to the earlier of 90 days (not 120) after any defendant has been served or 60 days (not 90) after any defendant has appeared.



Rule 16 has also expanded the scope of the scheduling order. Going forward, the scheduling order may provide for preservation of electronically stored information (ESI), and include agreements about disclosure of information covered by privilege.

Another addition allows courts to direct that parties must request a conference with the court before filing discovery motions. The Advisory Committee notes explain, "Many judges who hold such conferences find them an efficient way to resolve most discovery disputes without the delay and burdens attending a formal motion."

Rule 26: Discovery scope and limits, protective orders, timing and sequence, discovery plan

Rule 26 has undergone major revisions that will certainly change discovery practice. The changes delete some frequently cited provisions, and place the emphasis squarely on proportionality.

First, Rule 26(b)(1) alters the federal courts' rubric for scope of discovery in a way that will probably most often benefit defendants. Under the new rule, parties will only be able to obtain information that is relevant to a claim or defense and "proportional to the needs of the case," according to a variety of factors.

The Advisory Committee Notes to the amendment point out that there is often "information asymmetry" in discovery, where an individual plaintiff may have very little discoverable information, while the other party may have "vast amounts of information." In such a scenario, the Committee says, "the burden of responding to discovery lies heavier on the party who has more information." By making proportionality the centerpiece of discovery, the new rule will generally benefit parties with the most to produce – large corporate litigants.

Indeed, plaintiffs may worry that all discovery requests will be met with a blanket proportionality objection. However, the Advisory Committee noted, "the change does not place on the party seeking discovery the burden of addressing all proportionality considerations... Nor is the change intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional."

The potentially (but not decidedly) most important amendment to the rules deletes the frequently-cited description of discovery that is "reasonably calculated to lead to the discovery of admissible evidence." While it remains the rule that

evidence need not be admissible at trial to be discoverable, with this amendment the Advisory Committee sought to clarify the scope of discovery. The old phrase has been replaced with a new layer of review of cost/benefit analysis and burden to the parties.

To prevent parties from contesting the court's authority to allocate discovery costs, language has been added to expressly allow that protective orders may also allocate discovery expenses between the parties.

The discovery moratorium has also been relaxed – new language in 26(d)(2) permits requests for production of documents under Rule 34 to be sent prior to the 26(f) conference, though the requests will be considered served at the conference. The purpose of this change is to "facilitate focused discussion" during the conference, which may lead to changes in the requests.

In parallel with the Rule 16 amendments, Rule 26 now requires the discovery plan to address views on preservation of ESI, and whether the parties are requesting orders under Federal Rule of Evidence 502 (attorney-client privilege, work-product protection).

Rule 34: Time to respond to RFPDs, responses and objections to RFPDs

Rule 34 has been amended in several places with the goal of discouraging objections to requests for production.

Most notably, Rule 34 now requires that objections to RFPDs must be specific. When objecting, parties must state whether they are withholding any documents on the basis of the objection.

Of particular interest to plaintiffs, parties who do not produce a document at the time of responding must identify the date when they will produce it. Presumably this change will decrease the defense-side reliance on rolling productions.

The rule has also been amended in conjunction with Rule 26. Since Rule 26 now allows requests for production of documents to be sent before the 26(f) conference, Rule 34 sets the time to respond to those requests at 30 days after the 26(f) conference.

Rule 37: Failure to preserve ESI

The Rule 37 amendments build on the 2006 amendments, and introduce a new regime for preservation of ESI. The rule outlines a number of considerations, including: whether information should have been preserved in anticipation or conduct of litigation; if a party failed to take reasonable steps to preserve the information; if the information was lost as a result; and if it cannot be restored or replaced by additional discovery.

Upon a finding of prejudice resulting from the failure to preserve ESI, Rule 37(e) permits the court to order curative measures. And if the court finds that the failure to preserve was based on intent to deprive the opposing party of the information, the court may make a presumption that the lost information was unfavorable, give an adverse inference instruction to the jury, or grant a dismissal or default judgment.

These amendments were intended to create a nationwide standard for curative measures. Prior to the amendments there was no specific rule providing for curative measures, so those measures were based only on a court's inherent authority. As a result, there were big differences in the way different circuits treated the issue. Moving forward, parties should be able to expect similar results across circuits.

Parties looking to use this rule to their advantage should read the Advisory Committee notes to the amendment carefully because they provide some insight as to which party bears the burden of showing prejudice and intent.

Conclusion: Be prepared, and be a part of the discussion

Plaintiffs' attorneys need to be part of the discussion and briefing that will cement the new rules into our jurisprudence. Please spend an hour looking at the rule changes and how they could impact your practice so that you can advocate for common sense meaning of the rules as courts interpret the rules in initial cases.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