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Southern District Civil Practice Roundup

Expert Analysis

2015 Amendments To Federal Rules of Civil Procedure

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Significant amendments to the Federal Rules of Civil Procedure will take effect on Dec. 1, 2015, absent congressional action. According to the Advisory Committee on Federal Rules of Civil Procedure, the amendments are aimed at achieving three goals: (i) to "improve early and active judicial case management through amendments to Rules 4(m) and 16"; (ii) to "enhance the means of keeping discovery proportional to the action through amendments to Rules 26, 30, 31, 33, 34 and 36"; and (iii) to "encourage increased cooperation among the parties through an amendment to Rule 1."[1] Additionally, Rule 37(e), providing for sanctions for the failure to preserve electronically stored information (ESI), has been substantially amended, abrogating aspects of Second Circuit spoliation law.

Time Lines and Scheduling

Rule 4—Shortened Time Limits for Service. Current Rule 4(m) provides that a summons and complaint must be served on the defendant within 120 days after the complaint is filed. The amended Rule 4(m) shortens the time for service to 90 days with the stated goal of reducing delay at the beginning of litigation.[2] The Advisory Committee recognizes that this change will likely "increase the frequency for occasions to extend the time for good cause."[3]

Rule 16—Earlier and Expanded Scheduling Orders. Along the same lines, amendments to Rule 16 are also designed to encourage early judicial case management. As amended, Rule 16(b)(2) decreases the time for judges to issue scheduling orders from 120 to 90 days after any defendant has been served, or from 90 to 60 days after any defendant has appeared. Again, recognizing that tighter presumptive time limits may not always be feasible, the Advisory Committee observes that courts may find good cause to extend the time to issue scheduling orders where the nature of the litigation and the parties involved require more time to "establish meaningful collaboration" among counsel.[4]

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Rule 16(b)(3)(B), setting forth "permitted contents" of a scheduling order, has also been amended to reflect additional permitted items including agreements the parties reach regarding the preservation of ESI or the clawback pursuant to Federal Rule of Evidence 502 of information subject to the attorney-client privilege. The order may also require parties to request a conference with the court before making a discovery motion.[5]

Rule 26—Limits on Scope

The amended rules continue and sharpen the focus of prior recent amendments on making discovery proportional to the needs of each case. These changes, primarily to the scope of discovery authorized by Rule 26, are likely to generate litigation as the contours of the amended rules are established.

Rule 26(b)(1) has been amended in four principal ways. First, the "proportionality" factors which are currently listed in Rule 26(b)(2)(C)(iii) as bases requiring the court to limit the frequency or extent of discovery, have been moved and incorporated into 26(b)(1) setting forth the general scope of discovery. The amended Rule 26(b)(1) now adds to the general proposition that parties may obtain discovery into any non-privileged matter that is relevant to a party's claim or defense that the discovery also be "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."[6]

The Advisory Committee was not swayed by public comments expressing concern that the scope of discovery under this change will result in proportionality becoming a new blanket objection to discovery, placing an additional burden on the requesting party to justify the proportionality of all discovery requests. It stressed that the amendments are needed to give courts more authority to manage the discovery process, and concluded that adding proportionality to Rule 26(b)(1) "does not change the existing responsibilities to consider proportionality."[7]

Second, the Rule 26(b)(1) amendment deletes the provision specifying that parties may obtain discovery into the "existence, description, nature, custody, condition, and location of

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any documents or other tangible things and the identity and location of persons who know of any discoverable matter." The Advisory Committee reasoned that the discoverability of such information is so well established that it is not necessary for it to be specified in the rule.[8]

Third, the amendments remove the provision currently contained in Rule 26(b)(1) permitting the court to order discovery, for good cause, into any matter relevant to the subject matter involved in the action. The Advisory Committee explained that it "has been informed that the language is rarely invoked" and that "proportional discovery relevant to any party's claim or defense suffices…."[9]

Fourth, the amendments revise the provision from the current version of Rule 26(b)(1) granting discovery into relevant but potentially inadmissible information that is "reasonably calculated to lead to the discovery of admissible evidence." The Advisory Committee removes the reference to "reasonably calculated," finding that phrase has been used in some instances to expand, excessively, the scope of discovery.[10] That portion of the amended rule will read: "Information within the scope of discovery need not be admissible in evidence to be discoverable." Under this amendment, inadmissibility will not be a basis for opposing discovery, but parties will no longer be able to seek discovery of information that is not otherwise relevant, based on the reasonable possibility that it could produce leads that ultimately do yield relevant evidence.

Amendments to Rule 26(d) governing the timing and sequence of discovery adds a new subsection (2) modifying the requirement in subsection (1) that parties may not generally seek discovery before the Rule 26(f) conference. The new provision permits parties to "deliver" Rule 34 document requests to the plaintiff or other parties that have been served commencing 21 days following service of the summons and complaint.

The rule makes a distinction between "delivery" and "service" providing that such requests will be considered "served" for purposes of triggering the time limits for responding, only upon the Rule 26(f) conference being held. This revision is intended to "facilitate focused discussion" during the Rule 26(f) conference and the case management conference with the court.[11]

Rule 34: Objection Specificity

The principal change to Rule 34 is that the new rule will require objections to Rule 34 requests to be stated with specificity and to state whether any responsive materials are being withheld on the basis of the objection.[12] No longer will parties be able to interpose blanket objections to discovery requests, without first assessing how those objections will affect their ultimate production. This in turn will permit the requesting party to assess whether a particular request is worth litigating after it is met with an objection.

Rule 37—Sanctions and ESI

One of the biggest changes in the amendments, particularly for those practicing in the U.S. Court of Appeals for the Second Circuit, is the amendment to Rule 37(e) pertaining to sanctions available for the failure to preserve ESI. The amendment supersedes a substantial body of case law that has developed regarding sanctions for lost or destroyed ESI, including, for example, *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F. 3d 99 (2d Cir. 2002), which permitted imposition of an adverse inference instruction for negligent failure to preserve electronic information.[13]

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The revised Rule 37(e)(1) now requires as a threshold to any sanction that (i) the information was lost because a party failed to take reasonable steps to preserve it; (ii) it cannot be restored or replaced through additional discovery; and (iii) another party will be prejudiced by the loss of the information. In such circumstances, under amended Rule 37(e)(1), the court is authorized to impose limited sanctions "no greater than necessary to cure the prejudice."

The inquiry under this provision thus focuses on whether the information is actually lost, or whether it can be obtained from another source, whether a party had a duty to preserve and took reasonable steps to do so, and whether the loss of ESI prejudiced the party seeking the information. The court has discretion to determine how to assess prejudice, without placing the burden of proving prejudice on either party, as it may be difficult for the allegedly injured party to determine the contents of the lost information.[14]

Under amended Rule 37(e)(2), the court may use "specified and very severe" measures only upon a finding that a party deliberately destroyed evidence, in which case prejudice to the other party is presumed.[15] The sanctions available under Rule 37(e)(2) include the court (A) presuming that the lost information was unfavorable to the party; (B) instructing the jury that it may or must presume the information was unfavorable to the party; or (C) dismissing the action or entering a default judgment. These sanctions are not mandatory and lesser sanctions may be imposed.[16]

Conclusion

The proposed 2015 amendments aim to increase litigation efficiency and decrease its cost, particularly in discovery. Hopefully, the amendments' emphasis on increased specificity in document responses and proportionality in discovery, as well as narrowing the circumstances where sanctions can be imposed, will lead to more focused and less burdensome and expensive litigation.

1. Excerpt from the September 2014 Report of the Judicial Conference Committee on Rules of Practice and Procedure, available at http://www.uscourts.gov/rules-policies/pending-rules-amendments.
2. Advisory Committee Notes, Dec. 1, 2015 amendment to Rule 4.
3. Advisory Committee Notes, Dec. 1, 2015 amendment to Rule 4.
4. Advisory Committee Notes, Dec. 1, 2015 amendment to Rule 16.
5. Memorandum on the Proposed Amendments to the Federal Rules of Civil Procedure from the Chair of the Advisory Committee, June 14, 2014, available at http://www.uscourts.gov/rules-policies/pending-rules-amendments; Advisory Committee Notes, December 1, 2015 amendment to Rule 16.
6. Fed. R. Civ. P. 26(b)(1).
7. Advisory Committee Notes, Dec. 1, 2015 amendment to Rule 26.
8. Advisory Committee Notes, Dec. 1, 2015 amendment to Rule 26.
9. Advisory Committee Notes, Dec. 1, 2015 amendment to Rule 26.
10. Advisory Committee Notes, Dec. 1, 2015 amendment to Rule 26.
11. Advisory Committee Notes, Dec.1, 2015 amendment to Rule 26.
12. Fed. R. Civ. P. 34(b)(2)(B); Advisory Committee Notes, Dec. 1, 2015 amendment to Rule 34. Rule 34 has also been amended to allow parties to respond to production requests by stating that they will provide copies of documents and ESI rather than permit inspection.
13. Advisory Committee Notes, Dec. 1, 2015 amendment to Rule 37.
14. Advisory Committee Notes, Dec. 1, 2015 amendment to Rule 37.
15. Advisory Committee Notes, Dec. 1, 2015 amendment to Rule 37.
16. Advisory Committee Notes, Dec. 1, 2015 amendment to Rule 37.