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ELECTRONIC DISCOVERY & INFORMATION GOVERNANCE

Tip of the Month

Proposed Amendments to the US Federal Rules of Civil Procedure

Scenario

On September 16, 2014, the Judicial Conference of the United States approved several proposed amendments to the Federal Rules of Civil Procedure. The revised rules, now pending before the Supreme Court and to be transmitted to Congress, will take effect on December 1, 2015, absent some Congressional action. The general counsel of a financial services company has inquired whether the proposed amendments to the Federal Rules of Civil Procedure will result in a reduction in discovery costs.

Cooperation

In its current form, Rule 1 states that the Federal Rules of Civil Procedure "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." While the rule encourages the efficient administration of all matters in federal court, it is seldom invoked by either the court or the parties to rein in behavior that may cause delay or increase cost. As amended, the proposed rule specifically calls upon the parties and the court to cooperate to ensure that the rules are employed in a manner that promotes efficiency.

Driving the Pace

Unnecessary delays, lack of planning or non-cooperation at the outset of a case can result in inefficiency and expense. The proposed amendments to Rules 4, 16, 26 and 34 try to address these problems by shortening timelines and requiring parties to identify and discuss discovery issues early in the course of litigation.

Proposed Rule 4(m) reduces the time permitted to serve a defendant with a summons and complaint from 120 days to 90 days. If service has not occurred within the prescribed period, then the court must either dismiss the action without prejudice or order that service be completed by a date certain.

To further reduce delay at the outset of a case, proposed Rule 16(b)(2) would require courts to issue a scheduling order 90 days after any defendant is served, or 60 days after any defendant makes an appearance, whichever is earlier. Issuance of the scheduling order may be delayed, however, if the court finds good cause. In comparison, the current rule requires a scheduling order to be issued by the earlier of 120 days after service or 90 days after an appearance.

An amendment to Rule 16(b)(1), aimed at encouraging productive discussions during the scheduling phase, removes the current reference to conferences being conducted by "telephone,

mail, or other means." A note from the Advisory Committee on Federal Rules of Civil Procedure (the "Committee") explains the deletion of this language, particularly discussions by mail, by stating that "[a] scheduling conference is more effective if the court and the parties engage in direct simultaneous communication."

Proposed changes to Rule 26(f)(3) add "preservation" and "privilege" as topics to discuss at the Rule 16 conference. The proposed amendment requires parties to discuss whether they will seek an order under Federal Rule of Evidence 502—a valuable but underutilized rule that allows courts to prevent waiver of privilege. A coordinating proposed amendment to Rule 16(b) explicitly allows scheduling orders to include terms related to preservation and Rule 502 orders.

To further facilitate discussions during the Rule 26(f) conference, a proposed amendment to Rule 26(d)(2) permits the parties to serve document requests under Rule 34 before the conference, but no earlier than 21 days after service of the summons and complaint. This change to the current rule, which prohibits any discovery requests before the Rule 26(f) conference, allows the parties to address issues presented by the document requests at the Rule 26(f) conference. The early Rule 34 requests will be considered served at the first Rule 26(f) conference.

Finally, a proposed revision to Rule 16(b) allows a scheduling order to include terms requiring the parties to confer with the court before bringing any discovery-related motions.

Proportionality

Discovery under current Rule 26(b)(1) is extraordinarily broad: parties may obtain information "regarding any nonprivileged matter that is relevant to any party's claim or defense," including any information that "appears reasonably calculated to lead to the discovery of admissible evidence." With the increasing volume of data created and maintained by companies, significant time and money can be spent responding to discovery requests. When the parties have similar discovery exposure, they each have an incentive to narrow discovery without court intervention. Such self-regulation does not exist, however, when the parties' discovery obligations are asymmetrical. Current Rule 26(b)(2)(C) requires the court to limit discovery when it finds that the "burden or expense of the proposed discovery outweighs its likely benefit," but discovery limitations are rarely raised by the court on its own and, when objections to scope are raised by a producing party, courts can be reluctant to impose restrictions.

The Committee has proposed a few significant changes to combat the problems associated with asymmetric discovery. First, proposed Rule 26(b)(1) deletes the phrase that discovery may include information that is "reasonably calculated to lead to the discovery of admissible evidence." Second, amended Rule 26(b)(1) limits discovery to that which is "proportional to the needs of the case." Third, proposed Rule 26(b)(2)(C) will require court intervention if "the proposed discovery is outside the scope permitted by Rule 26(b)(1)."

Cost Allocation

Current Rule 26(c)(1) authorizes protective orders to preclude unduly burdensome or expensive discovery. Although not stated in the rule, courts may issue protective orders that allocate some of the cost to the requesting party. Because the current rule is silent on cost allocation, parties sometimes dispute the court's authority to shift costs. Proposed Rule 26(c)(1) states that the protective order may include "specifying terms, including time and place or the allocation of expenses, for the disclosure of discovery." As the Committee explained, "[e]xplicit recognition [of cost shifting] will forestall the temptation some parties may feel to contest this authority." The Committee was careful to note, however, that this proposed change does not alter the standard practice of having the responding party bear the cost of responding to discovery requests.

Responses and Objections to Document Requests

Parties responding to Rule 34 production requests typically list a litany of objections and often fail to specify whether any of the stated objections will be relied on as grounds to withhold any of the documents sought be the requesting party. Amended Rule 34 requires responding parties to state the specific grounds on which the party is objecting and whether any documents are being withheld on the basis of a given objection. The Committee intends this change to facilitate meaningful meet-and-confer discussions between the parties.

Failure to Preserve

The ability of courts to sanction a party for the spoliation of evidence is limited under the Federal Rules. Rule 37(e) permits such sanctions, but only when a party fails to *provide* electronically stored information in violation of a court order. Because Rule 37(e) applies to such a narrow set of circumstances, courts have turned to their inherent authority or state laws to sanction parties for their failure to preserve evidence resulting in disparate standards for what constitutes a party's duty to preserve and wide-ranging sanctions for violations of that duty. Without clear guidance on what sanctions may be imposed for the spoliation of evidence, companies often over-preserve data to avoid the risk of severe penalties.

To provide clarity and consistency on sanctions for failure to preserve, Rule 37(e) was completely rewritten. The proposed rule sets forth what sanctions a court may impose if electronically stored information is lost because of a party's failure to "to take reasonable steps to preserve it" *and* the lost information cannot be "restored or replaced through additional discovery." Under the proposed amended rule, sanctions are not permitted if evidence is lost despite a party's reasonable efforts to preserve it. Further, even if a party failed to try to preserve information, sanctions are not automatic. Under Proposed Rule 37(e)(1), a court may order "curative measures," but only upon a finding that another party was prejudiced from losing the information. More severe sanctions, such as an adverse inference or the entry of default judgment, are permitted under proposed Rule 37(e)(2), but only when the court finds that a party "acted with the intent to deprive another party of the information's use in the litigation."

Conclusion

The proposed amendments to the Federal Rules encourage early and enhanced case management and cooperation, which should provide an opportunity for counsel who are familiar with a client's electronic systems and well-versed in the real world issues of discovery to obtain substantial savings in time and money. Negotiation points can include the scope of discovery, use of certain agreed technologies, the clawback of privileged material and the preservation (or agreement not to preserve) certain documents. The proposed amendments relating to proportionality and sanctions may result in a reduction in the costs associated with overly broad discovery and over-preservation of data.

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