THE 2015 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE:

WHAT YOU NEED TO KNOW

The 2015 Amendments to the Federal Rules of Civil Procedure have been years in the making and will finally take effect on December 1. The amendments include changes that redefine the scope of relevant discovery and provide for sanctions for failure to provide electronically stored information. The amendments also are intended to speed up the early stages of litigation. Here we provide a summary of what you need to know to stay on top of the changing landscape for federal practice.

WHEN DO THE AMENDMENTS GO INTO EFFECT?

The amendments take effect on December 1, 2015.[1]

WHAT CASES FALL UNDER THE REVISED RULES?

The amendments apply to all proceedings commenced after December 1, 2015, as well as all proceedings then pending "insofar as just and practicable."

WHICH RULES ARE AMENDED?

The amendments affect Rules 1, 4, 16, 26, 30, 31, 33, 34, 37, 55 and 84.

WHAT ARE THE CHANGES?

1. SCOPE OF DISCOVERY

Arguably, the changes that have generated the most buzz in the legal community are to the scope of discovery under Rule 26(b). The new Rule 26(b)(1) language is quite different from the former Rule:

OLD RULE 26(B)

(1) *Scope in General.* Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense – including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C)

(2) *Limitations on Frequency and Extent.*

. . .

(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

. . .

(iii) the burden or expense of proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

NEW RULE 26(B) *(CHANGES IN* **BOLD***)*

(1) *Scope in General.* 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.**

(2) *Limitations on Frequency and Extent.*

. . .

(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

. . .

(iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1).

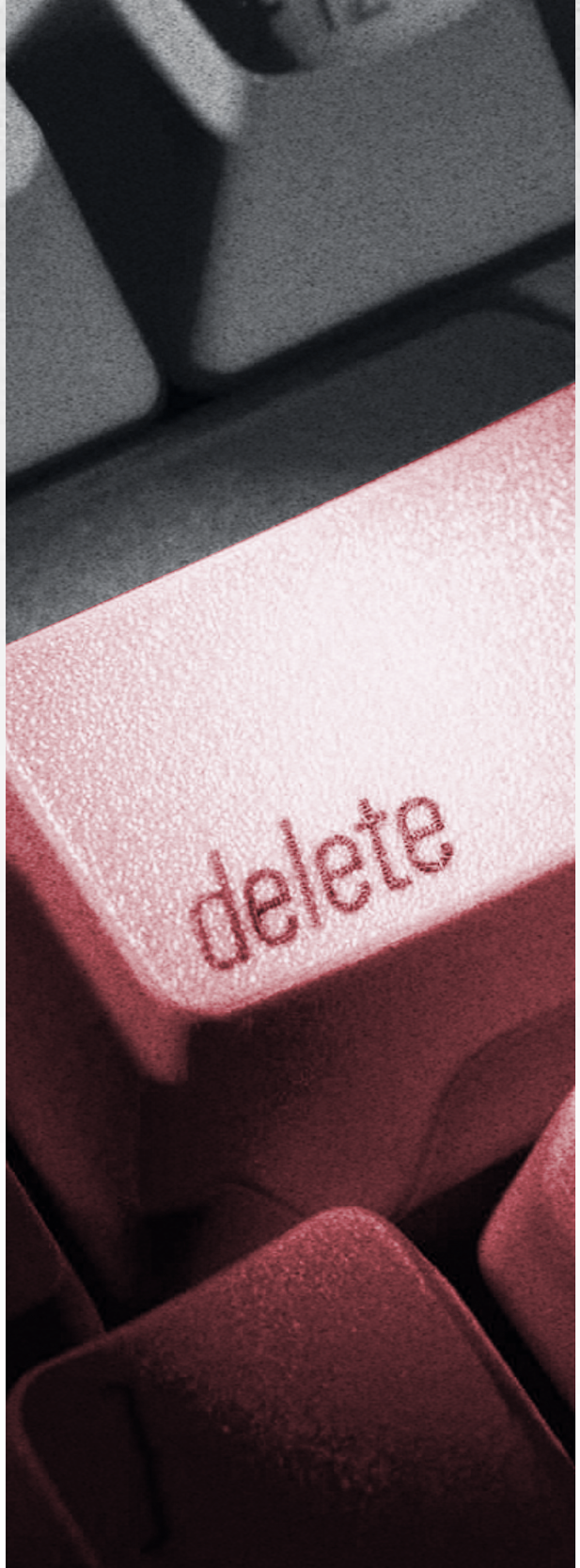
SEVERAL KEY CHANGES ARE IMMEDIATELY APPARENT:

• ADDITION OF PROPORTIONALITY

The Amendment restores proportionality as an express component to Rule 26's scope of discovery. The factors that were previously to be considered on a motion to limit to discovery under Rule 26(b)(2)(C) are now part of the proportionality inquiry under Rule 26(b)(1). Parallel changes are made in Rules 31, 31 and 33 to reflect Rule 26(b)(1)'s recognition of proportionality.

• DELETION OF "DESCRIPTION, NATURE," ETC.

The new rule deletes the provision for discovery of "the existence, description, nature, custody, condition and location of any documents or other tangible things and the identity and location of persons who know of any discoverable



matter." The Committee Note explains that the deletion is not meant to remove those items from the realm of discovery, but rather "[d]iscovery of such matters is so deeply entrenched in practice that it is no longer necessary to clutter the long test of Rule 26 with these examples."

• DELETION OF "RELEVANT TO THE SUBJECT MATTER"

The Amendment removes the prior language authorizing the court, *for good cause*, to order discovery of any matter relevant to the subject matter of the litigation. The Committee Note states that this language was "rarely invoked" and that proportional discovery suffices.

• DELETION OF "REASONABLY CALCULATED TO LEAD TO DISCOVERY OF ADMISSIBLE EVIDENCE"

Amendment also deletes the statement that evidence need not be admissible "if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." The Committee Note states that phrase "has been used by some, incorrectly, to define the scope of discovery" and that it was "never intended to have that purpose." The new rule replaces this language with a statement that "[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable." The Amendment, according to the Committee Note, eliminates this incorrect reading of the rule, but still retains the rule that inadmissibility is not a valid reason to oppose discovery of relevant information.

In addition, the Amendments also authorize under Rule 26(c)(1)(B) protective orders to include "allocation of expenses" arising from discovery. After concerns were raised in public comments, however, the Committee Note was amended to state that "[r]ecognizing the authority to shift the costs of discovery does not mean that cost-shifting should become a common practice" and that "[c]ourts and parties should continue to assume that a responding party ordinarily bears the costs of responding."

2. FAILURE TO PRESERVE ELECTRONIC INFORMATION

Another significant change to the Rules is the addition of provisions regarding sanctions for failure to preserve electronically stored information. Whereas the prior Rule 37 had very limited protection for litigants who had lost electronic information, the new Rule 37(e) provides for a more fulsome procedure in the imposition of sanctions for failure to provide electronically stored information.

OLD RULE 37(E)

(e) Failure to Provide Electronically Stored Information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

NEW RULE 37(E) *(CHANGES IN* **BOLD***)*

(e) Failure to **Preserve** Electronically Stored Information. **If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:**

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

(A) presume that the lost information was unfavorable to the party;
(B) instruct the jury that it may or must presume the information was unfavorable to the party; or
(C) dismiss the action or enter a default judgment.

Per the Committee Note, the old more limited Rule "has not adequately addressed the serious problems resulting from the continued exponential growth in the volume of [electronically stored] information." Accordingly, federal courts had established ranging standards for the imposition of sanctions or other measures for failure to preserve ESI, causing litigants "to expend excessive effort and money on preservation in order to avoid the risk of severe sanctions if a court finds they did not do enough." The new Rule is intended to foreclose reliance on the court's inherent authority or state law to determine what measures a court may employ if it finds information that should have been preserved was lost and what findings are necessary to justify those measures. The Committee made clear, however, that the new Rule 37(d) does not affect independent state law claims for spoliation. The Rule also does not create a new duty to preserve – rather, it is based on the existing common-law duty.

The Committee Note provides greater detail about what a finding of "reasonable steps" or "prejudice" entails and what "measures" might be appropriate where information is lost. Finally, it should also be noted that Rule 37(e)(2) rejects the use of an adverse-inference instruction on a finding of negligence or gross negligence in failing to preserve ESI, resolving a circuit split on the issue.[2] According to the Committee Note, "[t]he better rule for the negligent or grossly negligent loss of electronically stored information is to reserve a broad range of measures to cure prejudice caused by its loss, but to limit the most severe measures to instances of intentional loss or destruction."

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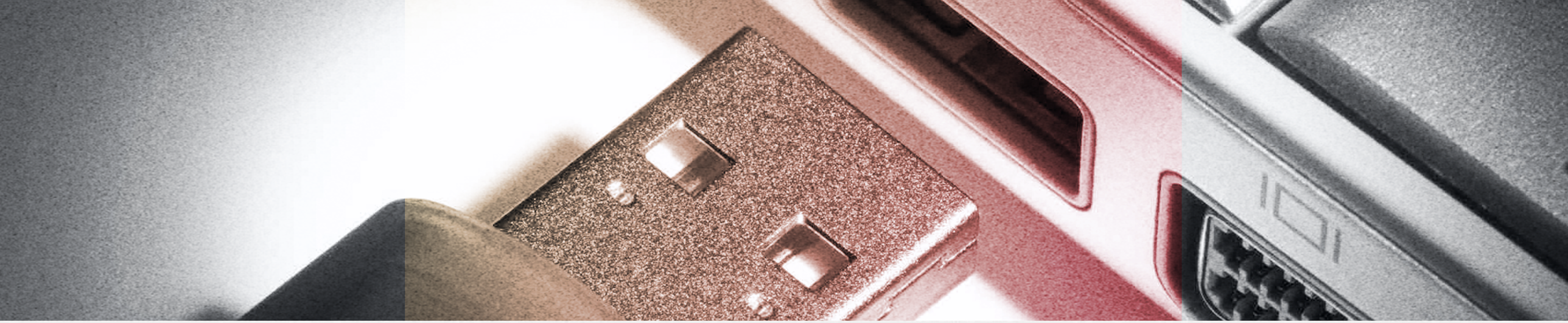

3. RESPONDING TO RFPS

There are three changes with respect to the substance of RFP responses: (1) objections to RFPs must be stated "with specificity," (2) responding parties may state they will produce copies of documents or ESI instead of permitting inspection, and should state a reasonable time for production,[3] and (3) an objection must state whether any responsive materials are being withheld on the basis of the objection.

OLD RULE 34

(B) *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state an objection to the request, including the reasons.

(C) *Objections.* An objection to part of a request must specify the part and permit inspection of the rest.

NEW RULE 34 *(CHANGES IN* **BOLD***)*

(B) *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state **with specificity the grounds for objecting to the request,** including the reasons. **The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.**

(C) ***Objections.*** **An objection must state whether any responsive materials are being withheld on the basis of that objection.** An objection to part of a request must specify the part and permit inspection of the rest.

According to the Standing Committee Chair Report, these three amendments are intended to eliminate three frequent problems: "broad, boilerplate objections," "responses that state various objections produce some information and do not indicate whether anything else has been withheld," and responses that state responsive documents will be produced but provide no indication of when they will be produced and the documents then are not produced expeditiously.

The Note goes on to say that a conference "may be held in person, by telephone, or by more sophisticated electronic means," seemingly doing away with conferences by mail.

4. SPEEDING UP AND STREAMLINING LITIGATION

Several changes throughout the Rules have the purpose of expediting the early stages of litigation and generally streamlining litigation:

- **SERVICE OF SUMMONS**

  The Amendments change Rule 4(m) to reduce the time for serving a defendant from 120 days following the filing of a complaint to 90 days.

- **ISSUANCE OF SCHEDULING ORDER**

  Rule 16(b)(2) is amended to reduce the time for the judge to issue the scheduling order from 120 days after service to 90 days, or from 90 days after any defendant has appeared to 60 days, unless there is good cause for delay.

- **EARLY RULE 34 REQUESTS**

  Under the old Rule 26, a party could not serve discovery until after the Rule 26(f) conference. Under new Rule 26(d)(2), RFPs may be served as soon as 22 days after service of the complaint and summons and before the Rule 26(f) conference. However, the response time does not commence until after the Rule 26(f) conference. This change is also reflected in Rule 34(b)(2)(A). The purpose of the change, according to the Committee Note, is to "facilitate focused discussions [on discovery] during the Rule 26(f) Conference."

- **ALTERING SEQUENCE OF DISCOVERY**

  Whereas the prior Rule 26 allowed for discovery in any sequence unless the court orders otherwise, the new Rule 26(d)(3) allows for the parties to agree to case-specific sequences of discovery.

5. RULE 16 CONFERENCES

The new Rule 16 strikes the provision that a scheduling conference may be held "by telephone, mail, or other means." Rather, the Committee Note explains that "[a] scheduling conference is more effective if the court and parties engage in direct simultaneous communication." The Note goes on to say that a conference "may be held in person, by telephone or by more sophisticated electronic means," seemingly doing away with conferences by mail.

OLD RULE 16(B)(1)

. . . . the district judge – or a magistrate judge when authorized by local rule – must issue a scheduling order: . . .

(A) after receiving the parties' report under Rule 26(f); or

(b) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference by telephone, mail or other means.

NEW RULE 16(B)(1)

. . . the district judge – or a magistrate judge when authorized by local rule – must issue a scheduling order:

(A) after receiving the parties' report under Rule 26(f); or

(b) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference.

6. CONTENT OF SCHEDULING ORDERS AND DISCOVERY PLANS

Rules 26(f)(3) and 16(b)(3) are amended in parallel to add additional items to scheduling orders and discovery plans:

• THREE ADDITIONS TO WHAT MAY BE IN A RULE 16 SCHEDULING ORDER:

The Amendments change Rule 4(m) to reduce the time for serving a defendant from 120 days following the filing of a complaint to 90 days.

• TWO ADDITIONS TO WHAT MUST BE IN A RULE 26(F) DISCOVERY PLAN:

Under the amended Rule 26(f)(3), the discovery plan must now also state the parties' views and proposals on: (1) any issues about preservation of electronically stored information, and (2) whether to ask the court to include their agreement about attorney-client privilege or work-product protection in an order under Federal Rules of Evidence 502.

7. THE RULES ARE THE RESPONSIBILITY OF ALL PARTIES

To emphasize that the parties share in the responsibility to employ the rules, Rule 1 is amended to state that the Rules shall be "construed, and administered and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." (Additions underlined). The Committee Note makes clear, though, that the amendment does not create any new or independent scope of sanctions.

8. SETTING ASIDE A DEFAULT

Rule 55(c) is amended to clarify that the Rule 60(b) standards only apply when seeking relief from a final judgment. A default judgment that disposes of less than all claims among all parties is not a final judgment unless the court directs the entry of a final judgment under Rule 54(b).

9. NO MORE APPENDIX OF FORMS

The Committee found that the purpose of the Appendix was to provide illustrations for the rules, which is no longer necessary. The Appendix of Forms has therefore been abrogated. The form for a Waiver of Service has been directly incorporated into the text of Rule 4.

SO WHAT DOES THIS MEAN FOR MY PENDING CASES?

As noted above, the amendments only apply to pending cases "insofar as just and practicable." But what is just and practicable? Obviously, for any cases in the very early stages of litigation, it is plain that most changes will be applicable going forward. For cases further along, the answer will vary case to case.

Should you go back and revise your discovery responses because of the changes to the scope of discovery? As explained in the Committee Note, the changes were more intended to correct misunderstandings rather than to change the proper scope of discovery. Thus, discovery responses should not need to be revised for scope, but only if the Rules were applied correctly the first time around.

What about responses to Requests for Production? If you are served with a set of RFPs between now and December 1, the best practice would be to prepare your responses to comply with the new Rules and avoid the time, cost and expense of preparing the responses under the old Rules and then revise them to comply with the new Rules. Also, depending on the animosity level between the parties, and to avoid timely and costly discovery disputes, a review of prior discovery responses may be necessary to bring them into compliance with the new rules. For instance, if the responses stated objections but did not state those objections "with specificity" or whether any information was withheld on the basis of those objections, the best practice would probably be to revise those responses.

Should you change your document preservation policies? The amendment regarding failure to preserve ESI should not affect what you preserve in your pending cases, as the new Rule 37 does not seek to define when the duty to preserve arises but rather what should happen once ESI that should have been preserved is lost. In fact, many judges have already implemented local rules to address ESI issues as the new Rules have done. Nevertheless, the Committee Note provides an important refresher about what "reasonable steps" to preserve ESI include.

What will the return of the "proportionality" requirement do to your cases? Though the Advisory Committee has said that restoring proportionality to Rule 26 does not change the responsibilities of the court and the parties, it is likely that this amendment will renew focus on the issue to the benefit of defendants. For example, many cases involve a single plaintiff against a large corporate defendant. The cost for a plaintiff to produce ESI is far less than it costs a corporate defendant to produce ESI, especially when most plaintiffs ask for voluminous documents over a large period of time. So, if a plaintiff's damages would be $300,000, but it would cost the defendant $150,000-$200,000 to produce the ESI, is that proportional? In most cases, the answer may be clear, but there will be instances where it is not. When the cost of discovery vs. damages scenario is as the example above, is it then appropriate to ask the plaintiff to share in the cost? And is that consistent with the Committee Note that the changes to the rules are not intended to shift the cost of discovery? It is likely that the courts will see more of these types of arguments now that proportionality has been expressly returned to Rule 26. ■

[1] *See* Order of Supreme Court adopting the rules (April 29, 2015). The entire package of materials transmitted to Congress – including the proposed rules, orders adopting the rules, Advisory Committee Note and Standing Committee Chair Report – is available at http://www.uscourts.gov/file/document/congress-materials.

[2] *Compare, e.g., Residential Funding Corp. v. DeGeorge Fin. Corp.,* 306 F.3d 99, 113 (2d Cir. 2002) ("[D]iscovery sanctions…may be imposed upon a party that has breached a discovery obligation not only through bad faith or gross negligence, but also through ordinary negligence.") with *Aramburu v. Boeing Co.,* 112 F.3d 1398, 1407 (10th Cir. 1997) ("The adverse inference must be predicated on the bad faith of the party destroying the records. Mere negligence in losing or destroying records is not enough because it does not support an inference of consciousness of a weak case.").

[3] Accordingly, Rule 37(a)(3)(B)(iv) is also amended to add authority to move for an order to compel production if "a party fails to produce documents."

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