A Legal Perspective

Proposed New Federal Civil Rules – Part Two (Proportionality & New Meet and Confer Requirements)

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The first article in this three part series addressed the potential effects that the proposed amendments to Federal Rule of Civil Procedure (FRCP) 3 (e), regarding the standards for sanctions, might have on records management and e-discovery practices. I noted that since the new proposed FRCP 37 would require a showing of willful or bad faith spoliation before sanctions can be imposed, "save everything" strategies would need to be quickly be replaced with disposing of records in accordance with a systematic disposition review process. This is because any disposal in a "save everything" environment could be seen as being "willful." Disposing of records as part of a "routine disposition" process, on the other hand, is done in the ordinary course of business and is, by definition, not willful or in bad faith. The proposed Rule 37 amendments also contain provisions that, in tandem with other proposed amendments, will drive the parties to reach agreement very early in a case regarding the scope of preservation. This will also help eliminate "save everything, just in case" practices with respect to preservation for litigation.

This article, the second in the series, discusses the proposed FRCP amendments relating to case management, cooperation and proportionality. Specifically, this article addresses the proposals to amend FRCP 26(b)(1), which pertains to the scope of discovery in federal litigation, the new proposed revisions to FRCP 16 regarding scheduling orders emanating from FRCP 26(f) "meet and confer" conferences, Rule 34 discovery requests and objections, and a new proposed FRCP 26(c) rules cost-shifting. Overall, the amendment package proposed, if enacted, will require both lawyers and judges to work harder in determining the proper scope of discovery for any particular legal matter, which in turn will certainly benefit records, data and information management efforts overall.

Amendments to Rule 26(b)(1)

The Federal Rules of Civil Procedure currently contain a rule designed to enforce proportionality: FRCP 26(b)(2)(C)(iii), which provides that "on motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules if it determines that * * * (iii) the burden or expense of the 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." In addition, the final sentence of the present Rule 26(b)(1) provides that "All discovery is subject to the limitations imposed by Rule 26(b)(2)(C)." Unfortunately, despite the clear language of these rules, they are rarely enforced by federal courts.

In an apparent attempt to underscore the proportionality requirements in the existing rule provisions, the Advisory Committee has proposed

to move the language in Rule 26(b)(2)(C) to FRCP 26(b)(1), thereby transferring the Rule 26(b)(2)(C)(iii) analysis to the beginning of the discovery process so that proportionality becomes a limit on the scope of discovery, rather than an after-thought. The proposed new Rule 26(c)(1) would require that discovery be proportional to the needs of the case considering:

- The amount in controversy;
- The importance of the issues at stake in the action;
- 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.

The proposed new Rule 26(b)(1) is, therefore, the center piece of the Committee's efforts to require proportionality in discovery. Notably, a corresponding change is made by amending Rule 26(b)(2)(C)(iii) to continue the court's duty to limit the frequency or extent of discovery that exceeds the limits of Rule 26(b)(1), on motion or on its own.

As currently set-up, the proposed new Rule 26(b)(1) would require the producing party to make proportionality decisions very early in the case, decisions which should help drive a targeted scope for preservation and aid in the defensible, routine dispositions needed to avoid sanctions under the proposed new Rule 37(e) (see [prior article]). To either defend decisions made unilaterally, or to convince an adversary at a Rule 26 meet and confer conference, lawyers will need to gain a robust understanding of their clients' information environments very early in the case. While his may require some additional cost up-front (a cost that should be tempered considerably with the use of indexing and search technologies) it will also serve to save significant costs later with respect to both e-discovery and records, data, and information retention. Saving everything just isn't going to cut it anymore – lawyers will need to be able to explain exactly what is being preserved and why, and this is really good news for those of us seeking to fully implement records management and disposition programs.

Rule 16 Scheduling Orders and Rule 26 Meet and Confer Conferences

The current Rule 16 (titled "Pretrial Conferences; Scheduling; Management") provides the "In any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes" as:

- Expediting disposition of the action;
- Establishing early and continuing control so that the case will not be protracted because of lack of management;
- Discouraging wasteful pretrial activities;
- Improving the quality of the trial through more thorough preparation; and
- Facilitating settlement.

Rule 16 further provides that the court must issue a Scheduling Order after receiving the parties' Discovery Plan report under Rule 26(f) or after consulting with the parties. The "required contents" of the Scheduling Order include the time by which to join other parties, amend the pleadings, complete discovery, and file motions. "Permitted contents" include provision that:

- Modify the timing of disclosures under Rules 26(a) and 26(e)(1);
- Modify the extent of discovery;
- Provide for disclosure or discovery of electronically stored information;
- Include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced;
- Set dates for pretrial conferences and for trial; and
- Include other appropriate matters.

A Rule 16 Scheduling Order may be modified only for good cause and with the judge's consent. Historically, the parties Rule 26(f) Discovery Plan is thin, at best, with each side seeking to keep all

options open, and the court's Scheduling Order is simply a form setting forth unrealistic "required" dates that will likely be adjourned several times.

The proposed new Rule 16 seeks to add three subjects to the list of "permitted contents" of a Scheduling Order. Two of them are also proposed for the list of subjects in a Rule 26(f) Discovery Plan. The first two subjects would permit a Scheduling Order and Discovery Plan to provide for the preservation of electronically stored information and to include agreements reached under Rule 502 of the Federal Rules of Evidence (relating to the handling of privileged documents).

As stated in the May 8, 2013 Report of the Advisory Committee (as supplemented in June 2013), each additional item suggested for inclusion in the Scheduling Order and Discovery Plan "is an attempt to remind litigants that these are useful subjects for discussion and agreement." The third subject proposed for inclusion (Rule 16(b)(3)(v)) permits a Scheduling Order to "direct that before moving for an order relating to discovery the movant must request a conference with the court." The Advisory Committee Report notes: "Experience with these rules shows that an informal pre-motion conference with the court often resolves a discovery dispute without the need for a motion, briefing, and order. The practice has proved highly effective in reducing cost and delay."

Significantly, while the new proposed Rule 16 only suggests that the Scheduling Order set forth provisions regarding the preservation of electronically stored information (based on discussion between the parties pursuant to Rule 26 (f)), this suggestion in effect becomes a mandate if the prosed amendments to Rule 37(e) (sanctions) are passed. As noted in the first article in this series (published in December 2013), the proposed new Rule 37(e) specifically states that two (of several) factors for the court to consider before imposing sanctions are whether the party received a request to preserve information and whether the party making the preservation request was willing to engage in good faith consultation about the scope of the desired preservation, in other words, was discussed at the meet and confer. In addition, when considering a motion for sanctions, under the new proposed rule 37(e), the court must consider whether the party alleged to have failed to preserve sought guidance from the court after trying to reach agreement on the scope of preservation with the other parties.

So, if both proposed rules 37 and 16 are enacted as currently written, if you fail to engage in preservation discussions in a meet and confer as suggested in Rule 16, and/or do not seek court guidance after failing to reach agreement in a meet and confer, these failures will count against you if your adversary later files a motion for sanctions based on alleged spoliation. This is significant because it will push lawyers to work harder to agree or litigate the scope of preservation very early in the case, and having clear agreements as to the scope of preservation helps to allow for a defensible, healthy, disposition process moving forward.

Yet another proposed amendment to Rule 26(c)(1)(B) would add an explicit recognition of the authority to enter a protective order that allocates the expenses of discovery. This power is currently implicit in present Rule 26(c), and is being exercised with increasing frequency. The amendment will make the power explicit, avoiding arguments that it is not conferred by the present rule text. Cost-shifting has been shown to be an effective governor on expansive discovery demands in those jurisdictions that have such rules (Texas) and this step forward on cost-shifting in the federal rules is a very productive step forward in the quest to contain discovery costs.

Rule 34 Requests for Production and Objections

Another significant proposed amendment is an amendment to Rule 26 that would allow Rule 34 Requests for Production to be made before the parties' Rule 26(f) conference. The purpose of such early requests would be to allow the parties to consider the actual requests at the meet and confer (as opposed to claiming that they can't

discuss because they don't yet know, as currently occurs), and allowing for early discovery planning. The Advisory Committee Report notes that the thought is that by serving the Requests for Production in advance of the conference, concrete disputes as to the scope of discovery could then be brought to the attention of the court at a Rule 16 conference. It's a nice idea indeed, and highly aspirational given that many Rule 27 conferences are far from substantive, but smart lawyers will likely be able use this position to their advantage, provided they have taken the time to gain a thorough understanding of their clients' record environments.

The Advisory Committee also seeks to amend Rule 34 in two ways: First, Rule 34(b)(2)(B) would require that the grounds for objecting to a request be stated with specificity, seeking to stop the current practice of serving general objections such as "Defendant objects to Plaintiff's Request No. 48 on the grounds that it is vague, overbroad, and seeks information that is not relevant to the claims or defense asserted in this case. Notwithstanding and subject to these objections, Defendant will produce responsive documents to the issues raised in the pleading on a date to be determined."

Under the new proposed rule, such general objections would be prohibited and producing parties would be required to articulate the requesting party's 'reach" that they are objecting to. The second proposed amendment (Rule 34(b)(2)(C)) would require that an objection "state whether any responsive materials are being withheld on the basis of that objection." The Advisory Committee Reports that this provision responds to the common lament that Rule 34 responses often, as illustrated above, begin with a "laundry list" of objections, then produce volumes of materials, and finally conclude that the production is made subject to the objections. At the end of the day, the requesting party has no idea whether anything it may feel is responsive has nonetheless been withheld. The Committee Note to the proposed rule recognizes the value of "rolling production" that makes production in discrete batches and also explains that it is proper to state in the discovery response the extent of the search — for example, that the search was limited to documents created on or after a specified date, or maintained by identified sources.

This proposed amendment, perhaps more than any other, will drive changed behavior in terms of clearly identifying early in a case what is – and what is not – within the scope of discovery for a legal matter, simply because lawyers are required to sign Rule 34 discovery responses. In so signing, under FRCP 26(g), they are certifying that:

> [T]o the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, response, or objection is:
>
> (A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;
> (B) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and
> (C) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

Moreover, Rule 26(g) also provides that "[i]f without substantial justification a certification is made in violation of the rule, the court, upon motion or upon its own initiative" shall impose an appropriate sanction, "which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee."

If the proposed amendments incorporate the benefits described above for seeking early

agreements or a ruling as to the scope of preservation and understanding early on what is and is not being produced, lawyers will be motivated to work with Records and Information Managers to fully learn and understand their client's records landscape. They will also be motivated to discuss and negotiate the scope of preservation with adversaries as soon as possible. To do this well, lawyers will need to work quickly to identify and collect relevant documents to use in framing the negotiations. Lawyers and courts will also need to work harder under the proposed amendments to identify alternate sources for information. All of this gives added value to the role of records managers and helps organizations begin to embrace the emerging professional role of records managers as Knowledge Strategists. (Stay tuned for our upcoming March 2014 newsletter article on Columbia University's Master of Science in Information and Knowledge Strategy, http://ce.columbia.edu/information-and-knowledge-strategy).

About the Author

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