Upcoming FRCP Amendments Have Three Goals

Changes aim to clarify spoliation sanctions, stress proportionality in discovery and expedite litigation

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Barring an extraordinary act of Congress, on Dec. 1, a set of amendments to the Federal Rules of Civil Procedure will take effect. The amendments are designed to accomplish three goals: (1) clarify the consequences of failing to preserve electronically stored information (ESI); (2) stress the importance of the proportionality principle in resolving discovery disputes; and (3) expedite litigation.

Consequences of Failing to Preserve ESI

The current rules have no standards for imposing sanctions on a litigant who fails to preserve ESI, except for Rule 37(e), which creates a safe harbor for the destruction of ESI by means of a "routine, good-faith operation of an electronic information system." According to the Committee Note to the new amendments, the absence of standards under the current regime has allowed federal courts to establish "significantly different standards for imposing sanctions or curative measures on parties who fail to preserve [ESI,] caus[ing] litigants to expend excessive effort and money on preservation in order to avoid the risk of severe sanctions if the court finds they did not do enough."

The new Rule 37(e), therefore, aims to reduce the uncertainty of spoliation sanctions by providing uniform guidelines for imposing them. Many of these guidelines take the form of limitations on a court's ability to impose spoliation sanctions, such as the following:

- *Reasonable Steps*. A litigant may be sanctioned only if the litigant did not take "reasonable steps to preserve" the ESI. The new rule does not say what constitutes "reasonable steps," but the Committee Note acknowledges that the rule does not require "perfection." The note also states that proportionality—a recurring theme in the new amendments—should be considered when evaluating whether a litigant has taken "reasonable steps," stating that a "party may act reasonably by choosing a

less costly form of information preservation, if it is substantially as effective as more costly forms."

- *Restoration or Replacement of Lost Information*. Another limitation is that sanctions can be imposed only if the lost information "cannot be restored or replaced through additional discovery." According to the Committee Note, a court's "initial focus" when presented with a charge of spoliation should be to determine if the lost information can be restored or replaced through other discovery sources, such as through sources that would otherwise be considered inaccessible under ordinary circumstances. If so, "no further measures should be taken."

- *Prejudice Required*. Still another limitation is that there must be a finding of prejudice to the party seeking the lost information. The rule does not state which party bears the burden of proving the existence or absence of prejudice, but the Committee Note suggests that courts may allocate the burden at their discretion, depending on the particular circumstances of a given case.

- *Sanctions Must Cure the Prejudice, and Nothing More*. If a finding of prejudice is made, the new rule permits the court to impose "measures no greater than necessary to cure the prejudice." The Committee Note states that, under this new rule, "[m]uch is entrusted to the court's discretion" with respect to determining the appropriate remedial measures, but the note also recognizes that "the severity of given measures must be calibrated in terms of their effect on a particular case" and cautions that the new rule "does not require the court to adopt measures to cure every possible prejudicial effect." The following are examples of "serious measures" that the court may consider:
    - forbidding the party that failed to preserve information from putting on certain evidence;
    - permitting the parties to present evidence and argument to the jury regarding the loss of information; or
    - giving the jury instructions to assist in its evaluation of such evidence or argument.
- *Most Severe Sanctions Require Finding of Intent to Deprive Party of Discovery*. Notwithstanding the considerable discretion given to judges to fashion an appropriate

remedy, a court may *not* grant any of the following remedies unless it first finds that the party that lost the information "acted with the intent to deprive another party of the information's use in the litigation:"

- presume that the lost information was unfavorable to the party;
- instruct the jury that it may or must presume the information was unfavorable to the party; or
- dismiss the action or enter default judgment.

A finding of an intent to deprive does not require that one of the three severe measures be imposed; rather, as the Committee Note cautions, "[t]he remedy should fit the wrong," and none of these three measures should be used when the lost information is "relatively unimportant" or lesser sanctions would cure the prejudice to the other party.

The Proportionality Principle

Since 1983, Rule 26 has embodied the principle that the discovery burden placed on litigants should be proportional to the case. Under the current rules, that principle is contained in Rule 26(b)(2)(C), which sets forth a series of circumstances in which a court must limit the scope of discovery, including when "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."

To "reinforce" the parties' obligation to consider the proportionality principle when preparing or responding to discovery requests, the new Rule 26 moves the proportionality principle into Rule 26(b)(1), which describes the permissible scope of discovery. That subsection will now provide (added language is shown in italics):

Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: 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' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.*

As the Committee Note makes clear, this change is one of emphasis, not substance: it "does not change the existing responsibilities of the court and the parties to consider proportionality." The Committee Note also stresses that "refus[ing] discovery simply by making a boilerplate objection that it is not proportional" will not be tolerated. Rather, the parties and the court must consider proportionality in good faith when making and responding to discovery requests and when resolving discovery disputes.

The new Rule 26(b)(1) also removes the sentence "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence" in favor of the simpler: "Information within this scope of discovery need not be admissible in evidence to be discoverable." The "reasonably calculated to lead to the discovery of admissible evidence" language was removed because some litigants had come to understand, erroneously, that it represented the permissible scope of discovery, such that *anything* that might lead to finding admissible evidence is discoverable. The intent of the new and former rule—which is made clearer in the new language—is simply to establish that information that is otherwise in the permissible scope of discovery does not become nondiscoverable simply because it would not be admissible at trial. Thus, for instance, hearsay information may be discoverable even though it is inadmissible.

Expediting Litigation

The new rule amendments seek to expedite litigation in three ways.

First, the new Rule 4(m) reduces by 30 days—120 to 90—the time for completing service of process on domestic defendants. As with the former rule, the deadline for serving process can be extended for "good cause," and the Committee Note recognizes that shortening the time for service should therefore "increase the frequency of occasions to extend the time for good cause." Still, the deadline for service of process should be treated "with the respect reserved for a time bomb," because noncompliance can result in dismissal of a complaint. *Braxton v. United States*, 817 F.2d 238, 241 (3d Cir. 1987).

Second, new Rule 16(b) reduces by 30 days the deadline for the court's issuance of a scheduling order to the earlier of 90 days (formerly 120 days) after any defendant has been served, or 60 days (formerly 90 days) after any defendant has appeared. Because the deadline

for conducting a Rule 26(f) conference among counsel is determined by the date of the court's initial scheduling conference, this change is also intended to result in earlier Rule 26(f) conferences. But Local Civil Rule 16.1(a)(1) already provides that initial conferences "shall be scheduled within 60 days of filing an answer, unless deferred by the Magistrate Judge due to the pendency of a dispositive or other motion." Since initial scheduling orders typically issue soon after the initial conference, this change to the federal rules may not affect local practice considerably.

Unlike its predecessor, the new rule allows a judge to issue a scheduling order later than this deadline so long as there is "good cause for delay." The Committee Note suggests that such good cause may exist in "[l]itigation involving complex issues, multiple parties, and large organizations," because, in such cases, additional time may be needed "to establish meaningful collaboration between counsel and the people who can supply the information needed to participate in a useful way."

Third, the new rule adjusts the moratorium on discovery before the Rule 26(f) conference by allowing the parties to serve Rule 34 document requests on a party at any time more than 21 days after the party has been served with process. Although the requests will not be deemed "served" until the Rule 26(f) conference, the early service of document requests should expedite litigation by allowing parties to start working through discovery issues earlier in the litigation.

Another aspect of the new Rule 34 may also expedite litigation. The new rule requires a party responding in writing to a Rule 34 document request to specify a reasonable time period by which it will produce responsive documents; otherwise, the production will be due when demanded in the document request. Requiring a responding party to put in writing when it will produce documents should have the salutary effect of expediting document productions as responding parties will be motivated to meet the deadline to which they have committed in writing.

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