The 2015 Amendments to the Federal Rules of Civil Procedure

Boston Bar Association

Commercial and Business Litigation Section

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Rule 1: Scope and Purpose

Amended Rule 1: Rules "should 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."

- "Employed"—connotes active management
- "Parties" as well as Court obligate

Agenda

- Scope of Discovery/Proportionality
- Early Case Management
- Changes to Rule 34
- Practical Implications for e-Discovery
- ESI Preservation/Spoliation

Scope of Discovery/Proportionality

Rule 26(b)(1): Scope of Discovery

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).~~

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.

Key Phrase Deleted

~~"Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence."~~

Advisory Committee Notes: "The phrase has been used by some, incorrectly, to define the scope of discovery."

Rephrased at end of paragraph: **"Information within this scope of discovery need not be admissible in evidence to be discoverable."**

"Proportionality" added to Rule 26(b)(1)

- Discoverable material is non-privileged, relevant to claims or defenses "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."
- Proportionality language removed from Rule 26(b)(2)(iii)—limitations Court may impose may be based on ~~"the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues."~~

New Rule 26(b)(1) Scope

- Revised Rule 26(b)(1) is expressly incorporated into the rules governing forms of party discovery: Rules 30(a), 31(a), 33(a), and 36(a).

- No change was made to Rule 45

A Little History

- **1983**: Rule 26(b)(1) allows Court to limit discovery that is "unduly burdensome or expensive, **taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.**"
- **1993**: Language moved to Rule 26(b)(2), discussion of Court's authority to limit discovery. Factors included: **"the burden or expense of the proposed discovery outweighs its likely benefit" and "the importance of the proposed discovery in resolving the issues"**
- **2000**: "All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii)[now Rule 26(b)(2)(C)]"

Proportionality: Implications and Practice Pointers

- Prepare concrete estimates
  - Value of information (demanding party)
  - Burden/cost of production (producing party)
- Offer compromises.
- Limit costs with technology
- Information asymmetry now important to both parties

Express Authority for Cost-Shifting

Amended Rule 26(c)(1)(B) authorizes the court to enter a protective order allocation the expense of initial disclosures or discovery:

(c) Protective Orders.

(1) *In General.* A party or any person from whom discovery is sought may move for a protective order . . .

(B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery;

Stipulated Sequencing of Discovery

Rule 26(d)(3) now allows the parties to stipulate to case-specific sequencing of discovery:

> *Sequence.* Unless~~, on motion,~~ the parties stipulate or the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:
>
> (A) methods of discovery may be used in any sequence; and
>
> (B) discovery by one party does not require any other party to delay its discovery.

Proposed Mass. Rule Changes

- "... 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."

- Comments close December 8

Early Case Management

Changes in Timetable

- New Rule 4(m): shortens the time for service to 90 days after filing (from 120)
- New Rule 16(b)(2): shortens time for initial scheduling order from 90 days after service (from 120) or 60 days from a defendant's appearance (from 90)
- New Rule 26(d)(2): allows early "delivery" of Rule 34 requests to facilitate 26(f) conference

Rule 16: Initial Scheduling Conference

Court must hold a Rule 16 conference: under amended Rule 16:

(b)(1) *Scheduling Order.* Except in categories of actions exempted by local rule, 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 ~~or by telephone, mail, or other means.~~

Advisory Committee Notes: conference may be held "in person, by telephone, or by more sophisticated electronic means."

Rule 16 Scheduling Order

Three additions to Rule 16(b)(3), "Permitted Contents" of a Scheduling Order.

The Scheduling Order may . . .

(iii) provide for disclosure, ~~or~~ discovery, or preservation of electronically stored information;

(iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under Federal Rule of Evidence 502;

(v) direct that before moving for an order relating to discovery, the movant must request a conference with the court;

Rule 26(f) Discovery Plan

Rule 26(f)(3) amended in parallel to require that the Discovery Plan state the parties' views and proposals on issues about preservation of ESI and include court orders under FRE 502:

(C) any issues about disclosure, ~~or~~ discovery, or preservation of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement in an order under Federal Rules of Evidence 502

Rule 34 Document Requests, Objections, and Production of Documents

Amended Rule 34(b): Response and Production

(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~~ 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.

- Expressly allows the production of copies
- Must produce at the time specified in the request or another reasonable time specified in the response.

Amended Rule 34(b): Objections

(2)(c) Objections. For each item or category, the response must either state that inspection and related activities will be permitted as requested or state ~~an objection~~ with specificity the grounds for objecting to the request, including the reasons. 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.

- A significant change to current practice—one which frontloads a great deal of document review and analysis.

Practical Considerations

How the Attorney uses "Proportionality" to Control the Cost of Discovery

Proportional to the needs of the case?

Discoverable material is: (1) non-privileged;
(2) relevant to a claim or defense, and
(3) "***proportional to the needs of the case***" based on the following considerations:

- Importance of the issues at stake,
- Amount in controversy,
- Parties' relative access to relevant information,
- Parties' resources,
- Importance in resolving the issues,
- Whether burden outweighs benefit.

Proportional to the needs of the case?

- In the context of civil litigation for damages, the primary focus of proportionality is usually cost.
- You cannot spend more than the case is worth.
- You cannot spend so much that the parties cannot afford to adjudicate their interests.
- We will focus on cost in this presentation.
- Cost is not always the driver, however (criminal matters, non-monetary issues, etc.).

Elements of Proportionality Analysis

In a civil litigation for damages, most attorneys instinctively know how to control discovery costs. There are typically four considerations:

1. Valuation of the case (claims, defenses, damages, strengths, weaknesses)
2. Proportionality of the cost of discovery
3. Selection of the scope of discovery
4. Completeness v undue burden

1. Valuation

- The great tragedy of valuation: it comes at the beginning when you know the least.
- It is nevertheless necessary to establish a litigation budget and a discovery budget.
- Your client will usually require this anyway.
- Look at strengths and weaknesses of claims & defenses, likelihood of success, possible damages, existence of insurance coverage, etc.
- You can make adjustments over time as the case unfolds, but you have to start somewhere.

2. Proportionate Discovery

- Based on your valuation, you must make at least a preliminary assessment of the appropriate scope and cost of discovery.
- This assessment allows you to determine when proposed discovery appears disproportionate.
- You cannot spend $1 million on a $100K claim.
- So how much can you / should you spend?
- My view: does the cost impair a party's right to adjudicate their legitimate claims?

3. Selection

- Discovery is inherently custodian based.
- Companies act through people.
- People have custody of evidence.
- People have email accounts, files, computers, permissions, access.
- This is especially true for electronic evidence, which is inherently tied to login identity.
- By selecting and prioritizing people, you are therefore selecting and prioritizing evidence.

3. Selection

- The primary cost in discovery is attorney time.
- The primary drivers of attorney time are the size of the review set and the number of depositions.
- Therefore, in every case, the scope of discovery is determined by being selective.
- You cannot discover everything. Where do you reasonably draw the line?
  - How many custodians? Depositions?
  - How many documents to review?
  - How many third-party subpoenas?

4. Completeness v Undue Burden

The opposing forces in a discovery dispute:

- Completeness:
  - "I am entitled to know!"
  - "I don't trust you! You hide evidence!"
- Undue burden:
  - "We can't afford this!"
  - "This is a fishing expedition!"
  - "You are trying to force me to settle!"
- The great sliding scale of discovery.

A Practical Methodology for Proportional Discovery

1. Broad preservation (over-inclusive)
2. Prioritization of relevant custodial subsets
3. Selection of proposed culling criteria
4. Disclosure of proposed criteria
5. Negotiation of final criteria
6. Agreement to supplement
7. Supplementation from preserved data

1. Broad Preservation

- Broad preservation is your first line of protection against spoliation claims.
- Preservation is usually much less expensive than actual discovery.
- In many cases, preservation can be as simple as retaining or making backups of relevant systems.
- Even if you do not produce in the first instance, you can produce if ordered.

2. Prioritization of custodians / repositories

- This is your first exercise of selection.
- Choose custodians who are most likely to be in possession of the key evidence.
- Limit the number of custodians to fit your determination of proportionality.
- E.g., is this a 3 custodian case? A 10 custodian case? A 50 custodian case?
- Custodians cost money!

3. Selection of Proposed Culling Criteria

- This is your second exercise of selection.
- What are the criteria for culling the custodial repositories?
  - Date range?
  - Keywords? Names, companies, terms?
  - Document types?
- Broad criteria are expensive; narrow criteria are economical.

4. Disclosure of Proposed Culling Criteria

- Disclose to opposing counsel your selection of custodian and criteria.
- This is your second line of protection against spoliation / misconduct claims.
- It can be done in conjunction with Rule 26(f) communications, or formalized as a joint discovery protocol.
- This queues up any issues before you have incurred any actual review costs.

5. Negotiation of Final Criteria

- Disclosure of proposed criteria opens a dialog with opposing counsel:
  - How many custodians? Which ones?
  - What culling criteria?
  - What production format?
- Resolving issues first avoids disputes later.
- By negotiation, or by motion if needed.
- Your obligations are now defined in the context of your specific case.

6. Agreement to Supplement

- If opposing counsel is concerned that the initial scope is too narrow, the discovery protocol can contain provisions for supplemental requests following review of the first round of production and depos.
- This may provide sufficient comfort to allow the parties to move forward with the highest priority subsets first.

7. Supplementation from Preserved Data

- Because you began with broad preservation, and you disclosed your criteria to opposing counsel, you are now in a position to make limited supplemental productions if requested.
- Supplemental productions are narrow and subject to the same selectivity methods described above.

Rule 37(e): Limits on Availability of Sanctions

Rule 37(e): Complete Overhaul

Failure to ~~Provide~~ ESI. ~~Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide ESI lost as a result of the routine, good faith operation of an electronic information system.~~

Failure to Preserve ESI. If ESI 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.

Walking Through Rule 37(e)(1)

IF

- "**ESI** . . .
- that **should have been preserved**. . .
- is **lost**. . .
- **because** a **party failed to take reasonable steps** to preserve it. . .
- **and** it **cannot be restored or replaced**. . ."

THEN

- ". . . the court, **upon finding prejudice** to another party from the loss of the information, **may** order **measures no greater than necessary to cure the prejudice**."

Walking Through Rule 37(e)(2)

IF all of the conditions in the introductory paragraph of the rule apply (ESI should've been preserved, is lost because of failure to take reasonable steps, can't be restored/replaced),

AND the court finds "that the party acted **with the intent to deprive another party of the information's use in the litigation**,"

ONLY THEN "may" the Court take one of these steps:

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

Rule 37(e): Implications and Practice Pointers

- ✓ Amended **Rule 37(e)** will apply only to ESI.
- ✓ **Rule 37(e)** does not provide specific direction but does give a party the ability to protect itself by taking reasonable steps.
  - ➢ The Committee Note affirms that the Rule "**does not call for perfection**."
  - ➢ "'Reasonable steps' to preserve suffice," and reasonableness depends on the party's particular circumstances.

Etc.

- Rule 4(d) and related form: new form for requesting waiver of service
- Rule 37(a): provides for motion to compel if party fails to produce documents
- Rule 55(c): amendment of rules concerning entry of default judgment and relief from same
- Rule 84 and the Appendix of Forms abrogated