

Everything You Need to Know About the 2015 Amendments to the Federal Rules of Civil Procedure



By Andrew Smith

Effective December 1, 2015, a number of changes will be implemented to the Federal Rules of Civil Procedure largely designed to speed up the discovery phase and focus on proper storage of electronically stored information (“ESI”). The changes are the result of a Rules Committee meeting held on May, 2010, at the Conference on Civil Litigation at the Duke University Law School. This article will explore the key changes in detail and provide insight into how we can expect practice in federal court to change later this year.

Rule 4. Summons

(m) Time Limit for Service. *If a defendant is not served within 90 days after the complaint is filed, the court — on motion or on its own after notice to the plaintiff — must dismiss the action without prejudice against that defendant or order that service be made within a specified time.*

Rule 4(m) will shorten the time period available to serve a defendant with the complaint and summons from 120 days down to 90 days. Should the plaintiff fail to perfect service within this time period, the court may dismiss the suit for failure to prosecute.

Rule 16. Pretrial Conferences; Scheduling; Management

(2) Time to Issue. *The judge must issue the scheduling order as soon as practicable, but unless the judge finds good cause for delay, the judge must issue it within the earlier of 90 days after any*

defendant has been served with the complaint or 60 days after any defendant has appeared.

* * *

(3) Contents of the Order.

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

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

Rule 16 will encourage the initial scheduling conference to involve direct simultaneous communications, whether in-person, by phone, or by videoconference, to avoid the historic delays created by written correspondence.

The Rule requires the judge to issue a scheduling order 90 days after any service upon defendant (instead of 120) or 60 days after any defendant has appeared (instead of 90).

The Rule will provide discretion for the judge to require a hearing before ruling on a motion to compel or discovery issue. The Committee Notes explain “[m]any judges who hold such conferences find them an efficient way to resolve most discovery disputes without the delay and burdens attending a formal motion.”

Rule 16 provides the first of a number of references to preservation of ESI by providing discretion for the scheduling order to directly address obligations for preservation of ESI.

Rule 26. Duty to Disclose; General Provisions Governing Discovery

(b) **Discovery Scope and Limits.**

(1) 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' 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) Early Rule 34 Requests.

(A) Time to Deliver. *More than 21 days after the summons and complaint are served on a party, a request under Rule 34 may be delivered:*

(i) *to that party by any other party, and*

(ii) *by that party to any plaintiff or to any other party that has been served.*

(B) When Considered Served. *The request is considered to have been served at the first Rule 26(f) conference.*

(f) Conference of the Parties; Planning for Discovery.

(3) Discovery Plan. *A discovery plan must state the parties' views and proposals on:*

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

Proportionality will be the key to determining the scope of discovery. Even if information is nonprivileged and relevant to any party's claim or defense, this

The purpose of the meeting will be to consider and vote on amendments to the Regulations of the Cincinnati Bar Association.

will not suffice. Discoverable information will also need to pass the amorphous proportionality test designed to restrict the scope of discovery. How courts will balance these factors remains to be seen. The proportionality change to Rule 26 is designed to limit the ever increasing costs of written discovery. However, it is unclear whether the intent will actually result in reduced discovery. The proportionality concept could encourage parties to make unilateral, subjective determinations to withhold information. This could also result in an increase of discovery-related disputes and motions to determine the scope of discovery.

Another notable change to Rule 26 is the elimination of the phrase "*reasonably calculated to lead to the discovery of admissible evidence*," which provides further evidence of the intent to restrict the scope of discovery significantly.

Rule 26 will allow the discovery phase to start earlier. Requests for production of documents will be permitted 21 days after service of process is completed between the parties serving and responding to the requests, even if this is before the initial Rule 26(f) scheduling conference.

Lastly, Rule 26 again references preservation of ESI by stating the discovery plan must state the parties' views and proposals on preservation of ESI.

Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes

(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.*

Rule 34 will require any objection to a request for production of documents to specifically state whether any responsive materials are being withheld on the basis of the objection.

This should quickly eliminate any unnecessary discovery battles over objections where no documentation even exists. The Rule is intended to allow the parties to reach the "meat" of any discovery battle over objections where actual documents or information exist to dispute. According to the Committee Notes, this "should end the confusion that frequently arises when a producing party states several objections and still produces information, leaving the requesting party uncertain whether any relevant and responsive information has been withheld on the basis of the objections."

The Committee Notes reject a requirement that the producing party must "provide a detailed description or log of all documents withheld," but do require the party to "alert other parties to the fact that documents have been withheld and thereby facilitate an informed discussion." Accordingly, a detailed log such as a privilege log is not required.

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

(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.

Importantly, Rule 37 will be totally revamped to address the consequences for the failure to preserve ESI. The former Rule 37 simply cautioned against imposing sanctions for a good faith failure to properly preserve discoverable ESI. The new Rule instead provides courts with an array of options to address failure to preserve ESI. The greater the prejudice and intent, the greater the sanction will be, up to and including entry of an adverse judgment against the culprit. The Rule is designed for courts across the country to provide uniform sanctions for the failure to preserve ESI.

The new Rule 37 also recognizes a duty to preserve ESI may arise before an action is filed by including reference to the "anticipation" of litigation. The Committee Notes state courts should consider the extent to which a party as on notice litigation was likely and whether the alleged information would be relevant in determining the "trigger" date for the duty to preserve ESI.

As a result of the new Rule 37, practitioners and clients alike must seriously address storage and preservation of ESI. Written ESI policies should be put in place. Counsel must address ESI in the very beginning of any litigation. The consequences for the failure to do so can be

drastic, including dismissal of your case.

Conclusion

A number of important changes will affect practice in federal courts under the Federal Rules of Civil Procedure beginning this December. The two biggest changes to the Rules we have to look forward to and begin addressing are:

Proportionality Test: Introduction of the proportionality test in Rule 26 will determine the scope of permissible discovery. Sought after information must be much more than "reasonably calculated to lead to the discovery of admissible evidence" as we have seen in the past. How courts will balance the proportionality factors remains to be seen.

ESI Preservation: The duty to preserve and account for ESI is here to stay, and is now incorporated in the actual Rules, beyond the common-law pre-

cedent established over the past decade. Preservation of ESI will be addressed in scheduling order and discovery plans. Courts will also have the ability to issue sanctions for failure to preserve ESI, including the outright dismissal of a lawsuit.

This round of changes to the Federal Rules of Civil Procedure will drastically affect your discovery and litigation practice. Be sure to review the changes and begin accounting for the new duties and obligations under Rules 26 and 37 starting in December of this year.

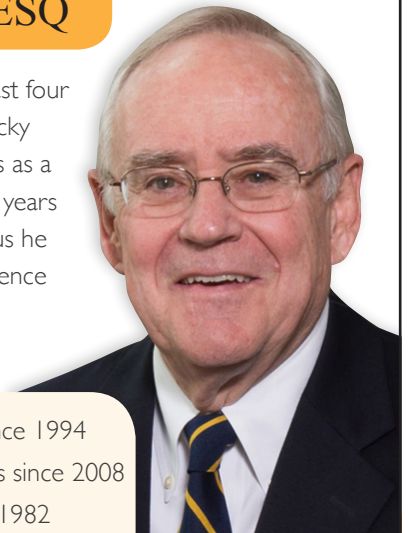
Smith is a senior associate attorney in the Cincinnati, Ohio office of Smith, Rolfe & Skavdahl Company, LPA who concentrates his practice in the areas of construction law, insurance defense, and bad faith litigation defense. Andrew has extensive experience in state and federal court handling complex civil litigation matters. He is also the co-host of BearcatsSportsRadio.com and an avid UC Bearcats follower.

MEDIATION SERVICES

THOMAS L. EAGEN JR. ESQ

Tom has been serving as a Mediator for the past four years in Southwest Ohio and Northern Kentucky and has participated in hundreds of Mediations as a lawyer and Mediator. Over the past forty two years he has tried over 100 jury trials to verdict. Thus he is uniquely qualified to bring his diverse experience to Mediations in an effort to arrive at practical resolutions and avoid costly litigation.

- Fellow American College of Trial Lawyers since 1994
- Advocate American Board of Trial Advocates since 2008
- AV Peer Rating by Martindale Hubbel since 1982
- Ohio Super Lawyers 2006 – 2015 inclusive



632 Vine St. Suite 900
Cincinnati, Ohio 45202

E-Mail teagen@eagenandwykoff.com

Tel: 513-621-7600 ex 14

Cell: 513-497-8234

Fax: 513-455-8246