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IN-HOUSE COUNSEL

In-House Counsel, E-Discovery and the New Federal Rules

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Special to the Legal

After a long lead time, the new amendments to the Federal Rules of Civil Procedure took effect Dec. 1. As U.S. Supreme Court Chief Justice John Roberts succinctly stated in his 2015 year-end report on the federal judiciary, "The amendments may not look like a big deal at first glance, but they are." Why? Discussions regarding discovery will begin much earlier in the life of a case, and there will be intense pressure upon counsel to better understand the electronically stored information (ESI) in their clients' possession. Litigants will also find a new safe harbor for the preservation of ESI, which should provide parties who take reasonable steps to preserve their ESI with a measure of security, thereby reducing the quantity of sanctions-related litigation. An up-front investment of time and resources in an organization's information governance structure will provide a tangible strategic and monetary advantage in navigating the new discovery regime.

Also present in the new amendments are narrower standards of relevance and proportionality, intended to constrain the scope of discovery. As amended, the rules seek to concentrate discovery on the claims and defenses and to make it more difficult to launch fishing expeditions and conduct "discovery-on-discovery."

THINGS HAPPEN FASTER (AND WITH MORE DAYLIGHT)

Several changes are aimed at accelerating discovery, either by shortening existing deadlines or by allowing discovery-related actions to "jump the line" and happen earlier in the life of the matter. The amended Rule 4(m) shortens the deadline for serving the defendant with a complaint to 90 days, down from 120. The revised Rule 16(b)(2) requires judges to issue scheduling orders within the earlier of 90 days (down from 120) after any defendant has been served with the complaint or 60 days (down from 90) after any defendant has appeared.

Rule 26(d)(2) is poised to have an even greater impact. Once 21 days have passed after the service of the summons and complaint upon a party, requests under Rule 34 may be delivered to that party by any other party or by that party to any plaintiff or to any other party that has been served. Under Rule 34(b)(2)(A), the deadline for responding to a preconference request is 30 days after the parties' first Rule 26(f) conference. Given this tight timeline for action, a party should plan to get started on its response to Rule 26(d)(2) requests before the Rule 26(f) conference has even taken place.

The amendments to Rules 16 and 26 also expect more transparency between the parties about their preservation efforts. Amended Rule 26(f)(3)(C) adds issues with the preservation of ESI as an appropriate topic to be considered in formulating the discovery plan. Supporting the change to Rule 26 is the amendment to Rule 16(b)(3)(B)(iii), which adds preservation of ESI as a permitted topic for the scheduling order. There is now also explicit authorization in Rule 16 at (b)(3)(B)(iv) for the parties to reach agreements under Federal Rule of Evidence 502 to address privilege-related disclosures in the scheduling order.

These changes set an expectation that the parties will discuss preservation and collection from the commencement of discovery. The new FRCP expect parties to arrive at the "meet and confer" with the

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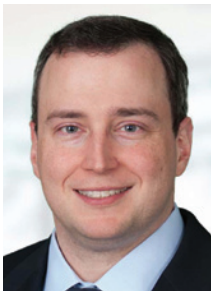

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knowledge required to discuss custodians, collection sources, preservation obligations and other factual details underpinning the discovery-related issues in the matter. The advisory committee notes for Rule 26 explicitly recognize situations will occur where an "information asymmetry" exists between the parties, with the burden of responding to discovery falling more heavily on the better-informed party. A party can best meet this increased burden by taking stock of its potential obligations before litigation commences and having a plan for its preservation and collection obligations.

RULE 26(B)(1): FOCUS ON RELEVANCY, PROPORTIONALITY

The 2015 amendments put proportionality at the forefront of discovery, with the most significant emphasis coming in Rule 26(b)(1), which has been rewritten to narrow relevancy and re-emphasize proportionality.

As amended, Rule 26(b)(1) confines discovery to "any nonprivileged matter that is relevant to any party's claim or defense." This eliminates the old authority for a court to order discovery of "any matter relevant to the subject authority," although this authority was rarely exercised in practice. More important is the deletion of the clause allowing information to be discovered if it "appears reasonably calculated to lead to the discovery of admissible evidence." Moreover, the rule change "signals to the parties that they have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings." The net effect of these changes is to place constraints on "fishing expeditions" and more closely tie discovery to the claims and defenses at issue in the matter.

Courts are also now required to determine whether discovery is "proportional to the needs of the case." The amended rule offers the following considerations to guide the proportionality analysis: "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." The intent here is to restore proportionality as a consideration in defining the scope of discovery.

The proportionality and relevance analysis in the amended Rule 26(b)(1) is envisioned by the advisory committee as an ongoing process rather than a one-off "checking of a box." As the parties become more sophisticated in their understanding of the claims and defenses, the proportionality analysis will change, and there should be the potential to narrow the discovery obligations. For this reason, a well-managed discovery plan under the new FRCP should tier discovery by placing the key custodians and subjects at the front of the line.

RULE 34: AN END TO GENERAL OBJECTIONS

Rule 34(b)(2)(B) now requires a party to state "with specificity" the grounds for objecting to a request. Parties can no longer recycle a series of general objections or make blanket claims that a request is not proportional or is overbroad. Under Rule 34(b)(2)(C), a party must now also disclose whether any responsive materials are being withheld on the basis of an objection. The advisory committee's notes add that where a party's objection discloses the limitations applied to its search for responsive and relevant materials, it is considered to have stated that anything outside the search has been withheld. A party that is transparent about its process is therefore allowed to be less precise about the potential universe of relevant information.

As a final note, drafting objections will now consume more time than before and require more information to be provided to outside counsel so they can satisfy their obligation under Rule 34(b)(2)(C).

RULE 37(E): SPOLIATION

In amending Rule 37(e), the advisory committee substantially rewrote a party's duties for preserving ESI. Sanctions now apply when "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." To linger on these factors for a moment: the amended rule applies only to ESI, which is subject to a common-law duty to preserve, where a party failed to take "reasonable steps" to preserve (meaning the standard is less than perfection) and that cannot be replaced. Furthermore, the most draconian sanctions (adverse inferences and/or dismissal) are available "only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation." In other instances, the court, "upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice." The amended Rule 37(e) therefore emphasizes the importance of having a plan for preservation. If a party acts in good faith under a routine and enforced records retention policy, keeps current with its preservation duties and uses a reasonable methodology, it will be afforded the safe harbor.

TAKEAWAYS

The best way to prepare for litigation under the amended FRCP is to get started on information governance planning now. For example:

- Map out your data infrastructure. Where do the majority of your litigation-relevant documents lie, and how can they be made available for counsel to collect, review and produce?
- Does your organization have a robust records retention policy, and is it being enforced? What are your pending and typical litigation/investigation preservation obligations? What regulatory obligations require preservation?
- Have a plan in place for how to implement a litigation hold once an event triggers a preservation obligation. Be prepared to inform not only the custodians, but IT staff, human resources officers and third-party vendors such as cloud storage providers.

The more you know about your data sources and your records management, the smoother the transition to litigation under the new regime will be. A well-informed party will be well-armed for the meet and confer and, through the new restrictions on relevancy and proportionality, will be in a position to make a strong case for a narrow (and correspondingly less expensive) discovery plan. •