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CHANGES TO DISCOVERY RULES
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Scope of Discovery: Proportionality Replaces "Reasonably Calculated"

The new version of Rule 26 effects a substantial change to the scope of discovery. Under the previous version of the rule, the phrase "reasonably calculated to lead to the discovery of admissible evidence" found in Rule 26(b)(1) was used to establish a broad scope for discovery.[i] The new version of Rule 26 removes that language from the rule in favor of a different standard. Because the change to the rule is so substantial, here is a blacklined version of the text of Rule 26(b)(1) showing the new and deleted language:

(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 the scope of discovery need not be admissible in evidence to be discoverable. ~~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)~~.

The new language also adds "the parties' relative access to relevant information" as a factor in the proportionality analysis. Another important factor in the new discovery rules has been added to Rule 26(c)(1)(B), which now authorizes courts to issue cost-shifting orders by determining the "allocation of expenses" for discovery where necessary.

The new language incorporates proportionality considerations into the definition of the scope of discovery, requiring parties to consider proportionality in making discovery requests, responses, and objections. The proportionality factors are not entirely new to Rule 26 – they were previously found in slightly different form without the new factor "the parties' relative access to relevant information" in Rule 26(b)(2)(C) and current Rule 26(g)(1)(B)(iii) also addresses them to some extent – but the new rule makes them an explicit part of the definition of discovery's scope, thus elevating their importance in the consideration of whether a particular request is within the permissible scope of discovery. Courts should now consider Proportionality within the context of the case in deciding all discovery disputes rather than falling back on the blanket declaration that the scope of discovery is broad.

The new rule gives rise to a number of considerations that attorneys should consider throughout the discovery process:

- Think about discovery when pleading claims and defenses. To a large extent, the parties' claims and defenses will inform the proportionality analysis, and including the unnecessary claims or defenses might result to unnecessary and potentially costly discovery.

- Consider proportionality when making requests in discovery and consider the possible cost of discovery because that cost might be cause for denting the discovery altogether or might ultimately be allocated to the requesting party.

- Keep in mind the burdens and costs imposed by a specific request in responding to it, particularly if it is demonstrable that the same information is available through less burdensome means.

- Be ready to discuss those burdens and costs with the opposing party with more specificity than simply stating that a particular request is burdensome and potentially costly. If a discovery dispute comes before a court, those burdens and costs will be important parts of the analysis.

- Remember that this analysis is holistic and requires consideration of all the factors. Focusing narrowly on individual factors like the amount in controversy, the responding party's financial resources, or the sheer cost of fulfilling a request should not satisfy the analysis. Consider and apply *all* the factors listed in the new rule to increase the chances of prevailing in a discovery dispute over scope.

Remembering these considerations might assist in realizing the Advisory Committee's hopes that the proportionality standard will "decrease the cost of resolving disputes without sacrificing fairness."[ii] Whether that happens remains to be seen, but the new standard will be the starting point for preparing discovery requests, responding to them, and disputing them for the foreseeable future, and attorneys must heed those new requirements.

Requests for Production: Changes to Timing and Formal Objection Requirements

The 2015 amendments to the Federal Rules of Civil Procedure also change the timing of requests for production, as well as how parties respond to such requests. These changes modify the procedure for serving and responding to requests for production considerably, so attorneys must be conversant with them to avoid mistakes, including the possible waiver of objections.

New language in Rule 26(d)(2) now permits a party to serve requests for production (but not interrogatories) before the Rule 26(f) planning conference but no earlier than 21 days after the party receiving the requests was served with process in the case. Such requests are deemed to have been serviced at the first Rule 26(f) conference, meaning that the responding party's 30-day deadline for responding to the requests begins at that time, not at the time that the requests were originally served. This new requirement marks a substantial change from the prior version of Rule 26, which generally prohibited any discovery prior to the Rule 26(f) conference.

Rule 34(b)(2) changes the requirements for responding to requests for production. Because the changes are substantial, the following is a blacklined version of the rule showing the changes.

(b) **Procedure.**

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(2) Responses and Objections.

(A) *Time to Respond.* The party to whom the request is directed must respond in writing within 30 days after being served or – if the request was delivered under Rule 26(d)(2) – within 30 days after the parties' first Rule 26(f) conference. A Shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(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~~ with specificity the grounds for the 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 not later than the time for inspection specified in the request or another

reasonable time specified in the response.

(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.

These changes are substantial, requiring parties to provider much greater specificity in their objections to requests for production. Simply stating, for example, without elaboration that a request is "vague and ambiguous" will no longer suffice – the objecting party must provide specific explanation as to why the wording of the request is vague and ambiguous. Perhaps a term used in the request is far too broad and without limitation would extend to areas not at issue in the case. Whatever the objection, the party making it must provide specifics. In addition to providing such specificity in the objection, a responding party must state whether they are actually withholding documents based on the objection. For documents that are not being withheld, the responding party must state whether it will produce copies or permit inspection of the requested documents and complete that production "no later than the time for inspection specified in the request or another reasonable time specified in the response."

The purpose behind these new requirements for objections is to "eliminate three relatively frequent problems in the production of documents and ESI."[iii] The first problem is "the use of broad, boilerplate objections that provide little information about the true reason a party is objecting." The second problem derives from "responses that state various objections, produce some information, and do not indicate whether anything else has been withheld from discovery on the basis of the objections."[iv] The third problem arises from "responses which state that responsive documents will be produced in due course, without providing any indication of when production will occur and which often are followed by long delays in production."[v] The Advisory Committee believes that these practices lead to discovery disputes and that eliminating them might reduce the incidence of such disputes. As was the case with the proportionality requirement, the success of meeting that goal is unknown at this point, but attorneys must understand the new requirements to respond correctly and effectively to requests for production.

Electronically Stored Information: New Standards for Sanctions

The Advisory Committee noted that the former version of Rule 37(e) dealing with electronically stored information ("ESI"), which was adopted in 2006, lacked sufficient detail guiding the handling of sanctions in light of "the explosion of ESI in recent years," which has "affected all aspects of civil litigation."[vi] That lack of detail resulted in a circuit split over handling the loss of ESI that should have been preserved for litigation: "Some circuits hold that adverse inference jury instructions (viewed by most as a serious sanction) can be imposed for the negligent loss of ESI. Others require a showing of bad faith."[vii] The resulting confusion led some parties to "over-preserve ESI" out of fear of being sued in a circuit where negligence was the standard, costing parties millions of dollars to preserve ESI for litigation that might never occur.[viii]

The new version of Rule 37(e) aims to correct those issues by scrapping the old rule entirely and instituting new requirements. The following blacklined version of the rule shows the changes:

(e) **Failure to ~~Provide~~ Preserve Electronically Stored Information**. ~~Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good faith operations of an electronic information system.~~ 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.

Under the new version of Rule 37(e), several requirements must be present before a court considers the imposition of sanctions for the unintentional loss of ESI.[ix] First, the lost ESI "should have been preserved in the anticipation or conduct of litigation."[x] Second, the party must have filed to take "reasonable steps" to preserve the lost ESI, a requirement that the Advisory Committee says "does not call for perfection" but does mandate consideration of the particular party, and its sophistication and experience with regard to litigation.[xi] Third, the lost ESI must not be subject to restoration or replacement through additional discovery—if the lost ESI "is restored or replaced, no further measures should be taken" with regard to sanctions.[xii] Fourth, the loss of ESI must prejudice the other party, a consideration that imposes no burden showing prejudice or the last of it on one party or their other, leaving the court with discretion to assess prejudice in particular cases.[xiii] If these requirements are met, the new text of the rule provides that the court "may order measures no greater than necessary to cure the prejudice."

The available range of sanctions is much more severe if the court finds that the party that lost the ESI "acted with the intent to deprive another party of the information's use in litigation." In such instances, the court may presume that the lost ESI was unfavorable to the party losing it, instruct the jury accordingly, or even dismiss the action or enter a default judgment. The intent requirement rejects cases permitting sanctions upon a finding of negligence. No prejudice is required if the loss was intentional. The Advisory Committee warns that courts should impose these sanctions cautiously, noting that the enumerated sanctions are not necessary even in the event that an intentional loss occurs, particularly where the lost information was not particularly important to the case.[xiv]

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[i] *See, e.g., Rotoworks Int'l Ltd. V. Grassworks USA, LLC,* No. CIV.07 05009, 2007 WL 1219716, at *2 (W.D. Ark. Apr. 25, 2007) (citing the "reasonably calculated" language in Rule 26(b)(1) to support the conclusion that "the scope of discovery permitted in civil litigation is broad"). As the Advisory Committee on Federal Rules of Civil Procedure noted in its memorandum explaining the new rules at the time it proposed them, the "reasonably calculated" language "was never intended to have that purpose" and was instead intended to prevent parties from using inadmissibility objections at depositions. Memorandum from Hon. David G. Campbell, Chair, Advisory Comm. On Fed. Rules of Civil Procedure to Jeffrey Sutton, Chair, Standing Comm. On Rules of Practice & Procedure (June 14, 2014), at B-10 (Advisory Committee Memo"). Efforts to curtail the use of the language to define the scope of discovery failed. *Id.* The Advisory Committee thus eliminated the language altogether in hopes of eradicating "this incorrect reading of Rule 26(b)(1)." *Id.*

[ii] Advisory Committee Memo, *supra* n. 1, at B-8.

[iii] Advisory Committee Memo, *supra* n. 1, at B-11.

[iv] *Id.*

[v] *Id.*

[vi] Advisory Committee Memo, *supra* n. 1, at B-14.

[vii] *Id.*

[viii] *Id.*

[ix] The rule has no application to other forms of information – it applies only to ESI.

[x] The duty to preserve information is of course not new—courts have long imposed requirements on parties to preserve information in circumstances where litigation might result. *See, e.g., Lewy v. Remington Arms Co.* 836 F.2d 1104, 1112 (8th Cir. 1988) (stating that "if the corporation knew or should have known that the documents would become material at some point in the

future then such documents should have been preserved.").

[xi] Fed. R. Civ. P. 37 Advisory Committee Notes, 2015 Amendment.

[xii] *Id.*

[xiii] *Id.*

[xiv] *Id.*