Discovery Under the New Federal Rules of Civil Procedure

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Submitted by Prof. Sara Ann Hook
Discovery Under the New Federal Rules of Civil Procedure

Sections I and II

Sara Anne Hook, M.B.A., J.D.

I. Overview of the Amended FRCP: A Look at What Has Changed and How

In December 2015, the Federal Rules of Civil Procedure were amended again, with particular attention paid to proportionality and the opportunity for sanctions. However, FRCP is interesting in that it requires everyone, not just lawyers, to cooperate in the litigation process:


Other revisions should encourage cooperation between lawyers, including Rules 4(m), 16, 26(d)(2) and 34(b)(2)(a), which reduce the time periods for various activities to happen. In addition, Rule 34 has been revised in ways that encourage cooperation and reduce the opportunity for dilatory tactics:

Rule 34: Boilerplate objections are prohibited and objections must "state with specificity the grounds for objecting" and "whether any responsive materials are being withheld." The Committee notes: "An objection may state that a request is overbroad, but . . . should state the scope that is not overbroad." An objection that "states the limits that have controlled the search for responsive and relevant materials"—which might include the date range or the scope of sources or search terms used—"qualifies as a statement that the materials have been 'withheld.'" Furthermore, this Rule includes a new provision that "[t]he production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response." This new provision appears to limit the parties' ability to engage in unconstrained rolling productions. [Id.]

In terms of Rule 26(b)(1)'s focus on proportionality, the Advisory Committee on Rules of Civil Procedure noted that a party "may not refuse discovery simply by making a boilerplate objection that it is not proportional." [Id.] As part of the revisions to Rule 37(e) on sanctions, the
Committee noted that the rule recognizes that "reasonable steps" to preserve suffice; it does not call for perfection." [Ibid.]

As reported by Brown, the five things that are most important to know about the amendments are:

1. Proportionality in discovery is now part of the rules.
2. Much-needed improvements are made to Rule 34(b)(2) regarding responses to document requests.
3. Rule 37(e) has been completely rewritten to standardize sanctions for failure to preserve ESI.
4. Document requests can be served 22 days after the complaint and summons are served, before any party has answered.
5. Rule 26 expressly authorizes an option of shifting expenses as part of a protective order. [Geraldine Soat Brown, The Top Five Things to Know About the New Federal Discovery Rules, The Circuit Rider 10-13 (Nov. 2015).]

A search of the K&L Gates and Kroll Ontrack databases reveals a number of interesting cases from the first half of 2016 that deal with email as one form of potentially relevant ESI. These cases specifically consider spoliation and sanctions and illustrate how courts have been applying the recently amended FRCP Rule 37(e). Among these cases are:


A particularly interesting case is presented in Brown Jordan International v. Carmicle with a dispute over custody and control over devices and which caused the court to use the newly

In this wrongful termination case, the defendant employee sought the return of his personal laptop from the company plaintiffs, who refused to release the laptop unless the plaintiff could provide he paid for it with his own money. The defendant then remotely locked a company laptop he had in his possession, and refused to provide a password to unlock it throughout the case proceedings, rendering it inaccessible. The defendant also claimed to have lost a personal tablet and other devices containing screenshots of emails and other data “despite the near certainty of impending litigation.” The plaintiffs filed a motion for sanctions under the newly amended Rule 37(e) for spoliation of evidence. The court determined that litigation was reasonably anticipated when the defendant destroyed or withheld data, and that he knew or should of known of his duty to preserve based on his background. Therefore, the court held that the defendant had acted with intent to deprive information from the plaintiffs, and accordingly ordered an adverse inference instruction for the jury. [Adverse Inference Instruction Issued in Light of Newly Amended Rule 37(e), http://www.ediscovery.com/pulse/case-law/detail/26684, accessed 9/8/16.]

An excellent explanation of why the Federal Rules of Civil Procedure (FRCP) were amended is provided by BakerHostetler:

These changes are in response to increasing costs and delays in federal litigation and are intended to compel clients and litigants to focus on the scope of discovery. Taken together, they require thorough early case assessment and early and frequent discussions with the adversary. Clients who are accustomed to higher fees when a case is in the throes of discovery might now see a bigger blip at the beginning, but the rules, when properly applied, could actually result in a lower discovery spend as the parties work things out instead of engaging in motion practice. The goals of the amendments are to improve case management, to refine the concept of proportionality, to encourage party cooperation, and to provide uniform preservation and spoliation rules across the country. Currently, the case law is quite varied by circuit, and even internally within a circuit. [December 2015 Changes to the Federal Rules of Civil Procedure: A BakerHostetler Q&A, Discovery Advocate, September 9, 2015, http://www.discoveryadvocate.com/2015/09/09/december-2015-changes-to-the-federal-rules-of-civil-procedure-a-bakerhostetler-qa/, accessed 9/7/16.]

In terms of the issues and challenges that clients will face now that the amendments to the rules are in effect and how lawyers should prepare, BakerHostetler provides the following helpful insights:
Both clients and counsel should be prepared to identify which sources of information and witnesses really matter to resolving disputes. We will need to work together to ensure that we are having the right conversations with each other and with our adversaries. Potential issues could arise as clients, counsel, and judges adapt to the new rules. There is ample opportunity for dispute.

Besides traditional commercial litigators, others who need to prepare include employment attorneys, patent prosecution attorneys, and bankruptcy attorneys, as the rules changes will affect all of those practices. Attorneys should study not just the additions and deletions to the rules, but also the committee notes, which give context to the changes. [Id.]

Fortunately, a number of excellent articles have been published that illuminate the impact of the amended rules on various aspect of law practice. For example, in terms of risk management, Jones provides the following observations:

What effect the amendments to Rule 26 will have on the discovery process remains to be seen. Certainly the requirement that discovery must now be relevant to any party’s claim or defense, as opposed to merely being reasonably calculated to lead to the discovery of admissible evidence, appears to be an attempt to limit fishing expeditions by requiring a more narrow focus. Whether this attempt is realized in practice, however, will only be determined after the courts have offered their interpretations on what, if any, practical distinction there is between the old language and the new.

The re-definition of the scope of discovery under Rule 26(b)(1) will likely have a limited impact on the discovery process. This language was already present, preamendment, in Rule 26(b)(2)(C)(iii), which permitted the court to order limits on discovery based on the factors now set out in Rule 26(b)(1). At the least, however, moving this language to a more prominent position in the rule should aid defense counsel in arguing to limit overly broad and expensive discovery requests from the plaintiff.

The amendments have a clear focus on the preservation and discovery of electronic information. The duty to reserve this evidence arises as soon as litigation is reasonably anticipated, and Rule 37 vests courts with a large degree of discretion in how to cure the loss of information that has been accidentally or intentionally spoliated. Because of this, it is extremely important for every organization to have measures in place to quickly and accurately identify those events that could lead to litigation, and to preserve all electronic information related to those events. [Chris Jones, Changes to Federal Rules of Civil Procedure Effective December 1, 2015, Risk Manager, July 24, 2015, http://sandsandersonriskmanager.com/2015/07/24/changes-to-federal-rules-of-civil-procedure-effective-december-1-2015/, accessed 9/8/16.]
Likewise, Pelletier and Steffe note how some of the amendments will impact patent law practice and perhaps address two of the major frustrations in patent litigation that are driving patent litigation reform, namely bare-bones pleading and onerous discovery. [Pauline Pelletier & Eric Steffe, The Politics of Patent Law, *Landslide*, July/August 2016, pp. 4-9, at 8.] As they assert, these amendments heighten the pleading requirements for patent cases by eliminating Form 18 and emphasize “proportional” discovery. [Id.] They go on to ponder the application of the amended rules in patent cases and the potential for confusion and duplication if patent litigation reform is pursued. Some of what they highlight as required under the amended rules should be noted for all types of litigation.

While the courts will be tasked with applying these rules, one could assume that elimination of Form 18 will require plaintiffs in patent cases to provide sufficient specificity to survive dismissal by specifying asserted patents and claims, providing more detailed allegations, alleging more facts to support infringement claims, and conducting more detailed lawsuit investigations. A legislative provision containing heightened pleading requirements risks being duplicative of the amendment, if the amendment is interpreted this way. Similarly, the new emphasis on “proportionality” in discovery suggests that aggressive requests with unbounded scope will have a lower chance of success, eliminating the point of leverage used by patent trolls for coercing early settlement. Because limited discovery, like heightened pleading, is one of the primary reforms offered in H.R. 9 and S. 1137, opponents of these bills will likely argue that the amendments address both concerns and Congress should leave well enough alone. [Id.]

The specific amendments to the FRCP that became effective on December 1, 2015, are as follows, as taken from 2015-2016 Federal Rules of Civil Procedure Amendments Released:

- **Rule 1** – Rule 1 is amended to emphasize that just as the court should construe and administer these rules to secure the just, speedy, and inexpensive determination of every action, so the parties share the responsibility to employ the rules in the same way. Most lawyers and parties cooperate to achieve these ends. But discussions of ways to improve the administration of civil justice regularly include pleas to discourage over-use, misuse, and abuse of procedural tools that increase cost and result in delay. Effective advocacy is consistent with — and indeed depends upon — cooperative and proportional use of procedure.
• **Rule 4 (with forms)** – The presumptive time for serving a defendant is reduced from 120 days to 90 days. This change, together with the shortened times for issuing a scheduling order set by amended Rule 16(b)(2), will reduce delay at the beginning of litigation.

• **Rule 16** – The provision for consulting at a scheduling conference by “telephone, mail, or other means” is deleted. A scheduling conference is more effective if the court and parties engage in direct simultaneous communication. The conference may be held in person, by telephone, or by more sophisticated electronic means. The time to issue the scheduling order is reduced to the earlier of 90 days (not 120 days) after any defendant has been served, or 60 days (not 90 days) after any defendant has appeared.

• **Rule 26** – The present amendment restores the proportionality factors to their original place in defining the scope of discovery. This change reinforces the Rule 26(g) obligation of the parties to consider these factors in making discovery requests, responses, or objections.

• **Rule 30** – Rule 30 is amended in parallel with Rules 31 and 33 to reflect the recognition of proportionality in Rule 26(b)(1).

• **Rule 31** – Rule 31 is amended in parallel with Rules 30 and 33 to reflect the recognition of proportionality in Rule 26(b)(1).

• **Rule 33** – Rule 33 is amended in parallel with Rules 30 and 31 to reflect the recognition of proportionality in Rule 26(b)(1).

• **Rule 34** – Several amendments are made in Rule 34, aimed at reducing the potential to impose unreasonable burdens by objections to requests to produce.

• **Rule 37** – Rule 37(a)(3)(B)(iv) is amended to reflect the common practice of producing copies of documents or electronically stored information rather than simply permitting inspection. This change brings item (iv) into line with paragraph (B), which provides a motion for an order compelling “production, or inspection.” Subdivision (e). Present Rule 37(e), adopted in 2006, provides: “Absents 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 operation of an electronic information system.” This limited rule has not adequately addressed the serious problems resulting from the continued exponential growth in the volume of such information. Federal circuits have established significantly different standards for imposing sanctions or curative measures on parties who fail to preserve electronically stored information. These developments have caused litigants to expend excessive effort and money on preservation in order to avoid the risk of severe sanctions if a court finds they did not do enough. New Rule 37(e) replaces the 2006 rule. It authorizes and specifies measures a court may employ if information that should have been preserved is lost, and specifies the findings necessary to justify these measures. It therefore forecloses reliance on inherent authority or state law to determine when certain measures should be used. The rule does not affect the validity of an independent tort claim for spoliation if state law applies in a case and authorizes the claim.

• **Rule 55** – Rule 55(e) is amended to make plain the interplay between Rules 54(b), 55(c), and 60(b). A default judgment that does not dispose of all of the claims among all parties is not a final judgment unless the court directs entry of final judgment under Rule 54(b). Until final judgment is entered, Rule 54(b) allows revision of the default judgment at any time. The demanding standards set by Rule 60(b) apply only in seeking relief from a final judgment.

• **Rule 84 (abrogated)** – Rule 84 was adopted when the Civil Rules were established in 1938 “to indicate, subject to the provisions of these rules, the simplicity and brevity of statement
which the rules contemplate.” The purpose of providing illustrations for the rules, although useful when the rules were adopted, has been fulfilled. Accordingly, recognizing that there are many alternative sources for forms, including the website of the Administrative Office of the United States Courts, the websites of many district courts, and local law libraries that contain many commercially published forms, Rule 84 and the Appendix of Forms are no longer necessary and have been abrogated. The abrogation of Rule 84 does not alter existing pleading standards or otherwise change the requirements of Civil Rule 8.

Early Case Management

Submitted by Prof. Sara Ann Hook
II. Early Case Management

A. Rule 4(m): Reduced Time for Service

As explained by Carson and Allison, "[u]nder Rule 4(m), the presumptive time to serve a defendant has been reduced from 120 days to 90 days." [Derek Carson & Alix Allison, Federal Rules Update: December 2015, The Federal Lawyer, April 2016, 63-64, 67.] The authors go on to state that:

The Advisory Committee Note explains that the driving force behind this change is the desire to reduce delay at the beginning of litigation. Further, Form 5 (Notice of Lawsuit and Request to Waive Service of Summons) and Form 6 (Waiver of the Service of Summons) have been incorporated into Rule 4 as a result of the abrogation of Rule 84. [Id. at 63.]

B. Rule 16: Scheduling Order Changes

As indicated by Secosky, Griset and McCray,

Changes to Rule 16 will reduce delays at the beginning of litigation by limiting the time to issue the scheduling order to the earlier of either 90 days (not 120 days) after service or 60 days (not 90 days) after any defendant has appeared. Also, the scheduling order may include Federal Rule of Evidence 502 agreements, which further the Courts' encouragement of non-waiver and claw-back agreements to facilitate discovery. [John J. Secosky, Jill Crawley Griset & Anne Bentley McCray, E-Discovery Update: Federal Rules of Civil Procedure Amendments Go into Effect, Legal Alert (McGuireWoods), December 1, 2015, https://www.mcuirewoods.com/Client-Resources/Alerts/2015/12/E-Discovery-Update.aspx, accessed 9/8/16, see also Carson & Allison, supra.]

C. Identifying Discovery Issues Early in Litigation

Some of the most significant changes to the FRCP occur in Rule 26 with respect to defining "proportionality, which have implications for identifying discovery issues early in litigation. As indicated by Secosky, Griset and McCray,

FRCP Rule 26(b) has been reorganized to place new emphasis on relevance and proportionality of discovery. The new rule changes the scope standard from "any relevant subject matter involved in the action" and information "reasonably calculated to lead to
the discovery of admissible evidence,” to information “relevant to any party’s claim or defense and proportional to the needs of the case.”

The proportionality factors have been relocated from Rule 26(b)(2)(C)(iii) to the front of the rule at FRCP Rule 26(b)(1) and include:

- 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.

These changes stress the parties’ obligation to consider proportionality when propounding and responding to discovery and to focus on discovery of relevant information.

Proportionality concepts in FRCP Rule 26(b) make their way into other revised rules as well. Additional depositions are permitted with leave of court in Rules 30 and 31, but the court can consider proportionality factors from 26(b). FRCP Rule 33 still limits interrogatories to 25, and additional interrogatories are permitted only to the extent consistent with the relevance and proportionality concepts in Rule 26(b)(1) and (2). [Secosky, Griset & McCray, see also Carson & Allison, supra, at 64, Fulton v. Livingston Fin., LLC, No. C15-0574JLR, 2016 WL 3976558 (W.D. Wash. July 25, 2016) and Lifeguard Licensing Corp. v. Kozak, No. 15 Civ. 8459 (LGS)(JCF), 2016 WL 3144049 (S.D.N.Y. May 23, 2016).]

D. Direct, Simultaneous Communication in Pretrial Conference

A wealth of helpful information is provided by Castile about how to effectively prepare for a Rule 26(f) conference, especially when electronically stored information (ESI) is involved, which the title of her article suggests it nearly always is. [Amii Castle, Preparing for Your Rule 26(f) Conference: When ESI Is Involved – And Isn’t ESI Always Involved? The Federal Lawyer, December 2015, pp. 45-49, 55.] As she notes in the brief abstract for the article, the amendments to the Federal Rules of Civil Procedure mean that litigators will have even more to do in the early stages of litigation, with the first few months being especially crucial if ESI is involved. [Id. at 45.] She outlines the follow steps, with practical commentary on what to do during each step:
Step One: Initial Scheduling Order, including setting a date for a Rule 16 scheduling conference, setting a date of the party’s Rule 26(f) conference and setting a date for submission of the parties’ planning report. [Id. at 45-46.]

Step Two involves talking to the client about relevant documents and data. Key questions to ask are:

- What evidence is relevant to the litigation?
- Who are the key players?
- Where does the relevant evidence reside?
- What is the relative accessibility of the relevant documents and data?
- If relevant data is effectively inaccessible, do substantially similar copies of relevant evidence exist?
- Are preservation and potential production obligations proportional to the needs of the case? [Id. at 46-47.]

As the author notes on page 46, these discussion points will not only help prepare for the Rule 26(f) conference, but they will also simultaneously assist the lawyer in competently instructing the client about its preservation obligations. [Id. at 47.] She asserts that the location relevant ESI must be discussed with the client at the outset of a case so that the lawyer can determine what ESI should be preserved. [Id.] She goes on to provide the following advice:

Finally, and a concept not to be ignored, document your analysis along the way. Consistently document – in the form of a memo to the file, a written communication to your client or law partner, or some other means – your preservation and production strategies. Clearly documented strategies on what evidence is relevant and proportional, and what evidence is not, will help you if you later have to defend those preservation or production obligations that you instructed your client to undertake. [Id. at 46-47.]

Step Three is the Rule 26(f) conference. The author suggests locating any forms that the lawyer’s district may provide that will guide the discussions at the conference, such as a form for the planning report. [Id. at 47.] Among the questions issues to cover in preparation for or during the Rule 26(f) conference are:

- In person or by phone?
• Topics
• Nature and basis of claims and defenses
• Settlement possibilities
• Preservation of discoverable information
• Automatic disclosures
• Scope and schedule – consider bifurcation
• ESI, such as forms of production and other ESI issues
• Privilege issues
• Changes to presumptive limits
• Other orders (such as preservation or protective orders)
• Discovery plan [Id. at 47-49.]

Finally, Step Four is the preparation of the parties’ planning report. The author notes that the contents of the form planning reports offered by various district courts can vary dramatically. [Id. at 49.] She goes on to recommend that:

No matter the jurisdiction – or the content of the court forms provided – your planning report should set forth the topics you discussed at the Rule 26(f) conference and should include your suggested, and sometimes extensively negotiated, discovery plan. The planning report also should include proposed deadlines for dispositive motions and expert disclosures. Work in tandem with your opposing counsel by exchanging report drafts, reduce your Rule 26(f) conference to writing, then jointly submit the planning report for the court’s review prior to the Rule 16 scheduling conference. [Id.]

E. Rule 34: Handling Objections to Requests to Produce

As indicated by Secosky, Griset and McCray,

Rule 34 adds a requirement that a response to a document request must state with specificity the grounds for objecting to the request, banning the previous practice of “boilerplate” objections. Rule 34(b)(2)(C) also requires that objections must state “whether responsive documents are being withheld on the basis of the objection.” While this requirement may be difficult to comply with when broad requests are propounded, and particularly requests that implicate large volumes of e-discovery, the notes to the Rule offer some relief. The notes indicate that “[a]n objection that states the limits that have controlled the search for responsive and relevant materials qualifies as a statement that the materials have been ‘withheld.’” [Secosky, Griset & McCray, see also Carson & Allison, supra, at 64, and Rowan v. Sunflower Elec. Power Corp., No. 15-cv-9227-JWL-TJJ, 2016 WL 3743102 (D. Kan. July 13, 2016).]
F. Drafting a Rule 37 Motion to Compel Disclosure or Discovery

As explained by Secosky, Griset and McCray,

Changes to Rule 37, pertaining to the preservation or loss of electronically-stored information, are also significant. First, Rule 37(e) adopts a common law principle that a duty to preserve arises when litigation is “reasonably anticipated.” Second, consequences for failing to preserve data are also better defined in the new Rules. Rule 37(e)(1) provides that the court, “upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice.”

Under the new Rule, more serious sanctions for loss of ESI are only appropriate where the court finds a party intended to deprive the other party’s use of the ESI in litigation. Only upon a finding of intent can the court impose sanctions of an adverse inference jury instruction, dismissal of the action, or default judgment. [Secosky, Griset & McCray, see also Carson & Allison, supra, at 67, and Jason R. Baron, IG and the New Rules: How Do the New FRCP Amendments Affect Info Gov Best Practices, LegalTech News, December 7, 2015. http://www.legaltechnews.com/id=1202744155359/IG-And-The-New-FRCP-Rules?slreturn=20160808104536, accessed 9/8/16.]

Although not per se about the amendments to the FRCP, Nelson and Simek are two favorite authors who are on the cutting edge of electronic discovery, cybersecurity and digital forensics. In preparing this section of the manual for the seminar, the website for their company, Sensei Enterprises, Inc., https://senseient.com/, was consulted for recent articles by them.

Lawyers are encouraged to sign up for Sensei’s free article distribution service. Fortunately, Nelson and Simek just released a new article on competence in electronic discovery, partly in response to Formal Opinion 2015-193, from the State Bar of California, published on June 30, 2015. [Sharon D. Nelson & John W. Simek, Competence in E-Discovery, Sensei Enterprises, Inc., 2016, https://senseient.com/articles/competence-e-discovery/, accessed 9/8/16.] Among the nine core skills that the State Bar of California says a lawyer working with ESI should have as reported by Nelson and Simek are:

1. initially assess e-discovery needs and issues, if any;
2. implement/cause to implement appropriate ESI (Electronically Stored Information) preservation procedures;
3. analyze and understand a client's ESI systems and storage;
4. advise the client on available options for collection and preservation of ESI;
5. identify custodians of potentially relevant ESI;
6. engage in competent and meaningful "meet and confer" with opposing counsel concerning an e-discovery plan;
7. perform data searches;
8. collect responsive ESI in a manner that preserves the integrity of that ESI; and
9. produce responsive non-privileged ESI in a recognized and appropriate manner.