

April 30, 2015

Supreme Court Adopts Amendments to Federal Rules, Many Impacting E-Discovery Practice, to Become Law on December 1, 2015

On April 29, 2015, the Supreme Court of the United States adopted and submitted to Congress the current set of pending amendments to the Federal Rules of Civil Procedure ("FRCP"), many of which could have a significant impact on e-discovery and information governance practices. Unless Congress acts to the contrary, the amendments will become law on December 1, 2015.

The set of changes to the FRCP include amendments to Rules 1, 4, 16, 26, 30, 31, 33, 34, 37, 55, and 84 and the Appendix of Forms; the changes with the most potential to impact e-discovery are reviewed below (new rule text is underlined; removed rule text is struck through):

- Rule 1 has been amended to state "[These 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."

As described in the new Committee Note, the new language is intended "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." The note further states that "[e]ffective advocacy is consistent with — and indeed depends upon — cooperative and proportional use of procedure."

- Rule 26(b)(1) has been amended to focus on limiting the scope of discovery:

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. — 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 Committee Note specifies that the changes to Rule 26(b)(1) include returning the proportionality factors from Rule 26(b)(2)(C)(iii) back to Rule 26(b)(1), where they resided before 1993. This was done to "restore[] 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." The proposed amendments also remove the "reasonably calculated" language from the rule because "[t]he phrase has been used by some, incorrectly, to define the scope of discovery" and "has continued to create problems[.]"

- Rule 37(e), which addresses sanctions, has seen significant changes; the new rule now states:

Failure to 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 operation 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.

As explained by the new Committee Note:

[The existing 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.

The Note also specifies that the new rule "forecloses reliance on inherent authority or state law to determine when certain measures should be used." Addressing subdivision (e)(2), which allows more severe sanctions under the rule only when a court first finds that a party acted "with the intent to deprive another party of the information's use in the litigation," the Note explains, significantly, that the rule "rejects cases such as *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002), that authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence."

The Supreme Court's order adopting the amendments, its submission of the amendments to Congress, and the full text of the amended Federal Rules of Civil Procedure are available on the website of the Supreme Court at http://www.supremecourt.gov/orders/courtorders/frcv15_5h25.pdf. The most recently published version of the proposed Committee Notes and a full version of the amended rules with text additions underlined and text removals struck through are available on the United States Courts website at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2014-add.pdf>.

* * *

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

H. Christopher Boehning
(212) 373-3061
cboehning@paulweiss.com

Daniel J. Toal
(212) 373-3869
dtoal@paulweiss.com

Liza Velazquez
(212) 373-3096
lvelazquez@paulweiss.com

Ross M. Gotler
(212) 373-2979
rgotler@paulweiss.com