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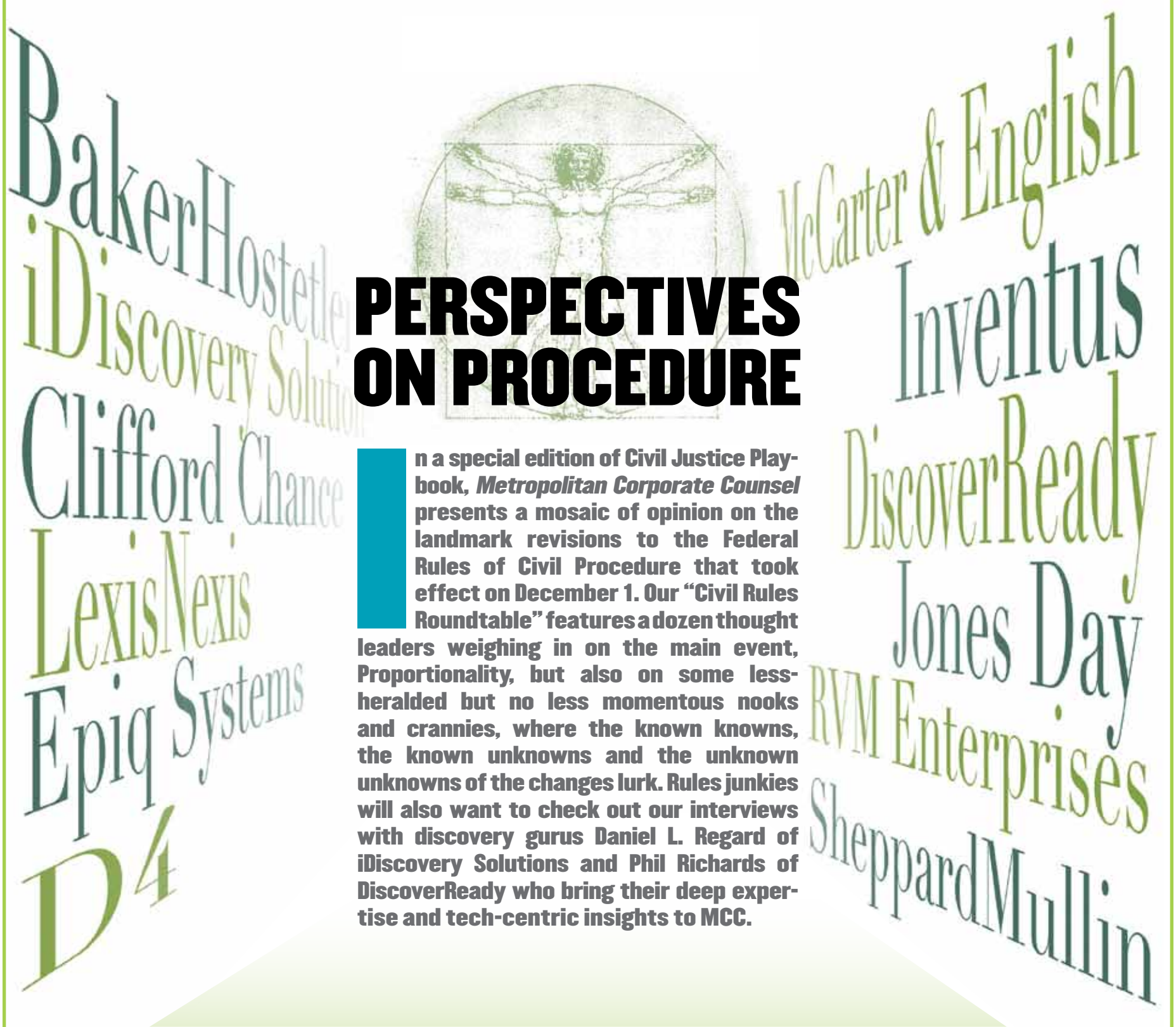
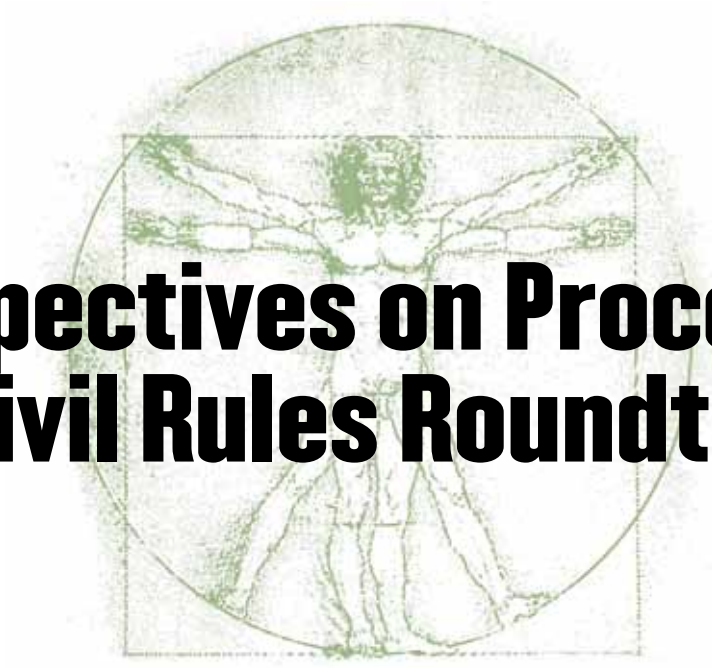


PERSPECTIVES ON PROCEDURE

In a special edition of Civil Justice Playbook, *Metropolitan Corporate Counsel* presents a mosaic of opinion on the landmark revisions to the Federal Rules of Civil Procedure that took effect on December 1. Our "Civil Rules Roundtable" features a dozen thought leaders weighing in on the main event, Proportionality, but also on some less-heralded but no less momentous nooks and crannies, where the known knowns, the known unknowns and the unknown unknowns of the changes lurk. Rules junkies will also want to check out our interviews with discovery gurus Daniel L. Regard of iDiscovery Solutions and Phil Richards of DiscoverReady who bring their deep expertise and tech-centric insights to MCC.



Perspectives on Procedure: A Civil Rules Roundtable

The Burden Shifts to the Judges

As the revised Federal Rules of Civil Procedure were about to kick in on December 1, *Metropolitan Corporate Counsel* caught up with John K. Rabiej, director of the Center for Judicial Studies at Duke Law School. It's not a stretch to say that if the revised rules were a start-up company, Duke was the incubator.

Rabiej was a little breathless. He had just returned from the first leg of the "Rules Amendment Roadshow," a joint production of the ABA Section of Litigation and Duke. This 13-city tour, led by the apparently indefatigable U.S. District Judge Lee H. Rosenthal of the Southern District of Texas and Prof. Steven Gensler of the University of Oklahoma College of Law launched to packed federal courthouses in New York City, Philadelphia and Newark on November 10-12.

Rabiej, a longtime rules and e-discovery guru who served as executive director of The Sedona Conference and, before that, spent 20 years with the Judicial Conference Committee on the Rules of Practice and Procedure, was there to see how Duke's handiwork made the leap from page to stage – its "Guidelines and Practices" developed to help judges and parties put the revised rules into action (see https://law.duke.edu/judicialstudies/conferences/proportionality/materials/). No out-of-town tryouts for this show. They launched at the judicial equivalent of Broadway, the Thurgood Marshall U.S. Courthouse in downtown New York City, where they picked up a thing or two about stagecraft. "We learned right away not to set the panelists above the audience," Rabiej says, noting that putting them on same level stimulated more of the give-and-take they were seeking.

The show was not without controversy. It launched against a backdrop of criticism leveled in an opinion piece on *Law360* by Suja A. Thomas, a law professor at the University of Illinois College of Law (coincidentally Rabiej's own alma mater). Thomas blasted Duke, accusing it of being in the hip pocket of big business. "With corporate influence," she writes, "Duke has published guidelines that permit corporations not to disclose information that is required under the federal rule, and federal judges are being educated on those guidelines."

Rabiej takes the criticism seriously. He is quick to point out, however, that the Duke Center is financially independent, the roadshow is funded by modest registration fees, and that all the Center's work, including the Guidelines and Practices, grew out of the input of plaintiff and defense lawyers, judges and academics, none of whom was compensated. Not surprisingly, the debate continued to play out during the roadshow.

"Some of the panelists were very concerned that these rules would give no importance to cases that did not involve much money – for example, cases involving constitutional rights or civil employment discrimination," he says. "They were quite passionate in their views and their criticism of the rules." Under the amendments, however, a judge must consider the "importance of the issues at stake" in the proportionality analysis.

Contrary to Prof. Thomas' suggestion, the Guidelines are not official rules, and they make no claim to the contrary, he says. Rather, they are "suggestions" designed to stimulate discussion about implementation and interpretation. "There's nothing that requires a judge to do anything," he says.

In the contributions that follow, MCC provides a mosaic of viewpoints on the revised rules. While there is much discussion of proportionality, which is very much top of mind for most observers, there's far more to the changes. For his part, Rabiej is tracking the procedures designed to accelerate matters, including the key Rule 26(f) conference. He also has his eye on Rule 34, which deals with specificity in production, and, of course, the changes to Rule 37 on sanctions. As for e-discovery, he doesn't see a big impact on preservation – at least not right away.

"I think the attorneys will be conservative, preserving a lot unless emerging case law limits that, but they'll be able to sleep better," he says. "Currently, the producing party is subject to the most severe sanctions if an employee just negligently deletes something. Now, as long as there are reasonable efforts, you won't be subject to the most severe sanctions."

At the first roadshows, he says, a certain pragmatic ethos began to emerge, at least among the judges. "They were the ones to put their finger on it," he says. "We need to come up with a way to get the information that both parties need – not necessarily anything that's relevant, but what they actually need – and get it to them promptly. The rules are intended to address that, and the Guidelines put a little more flesh on the bones. Obviously, there's mistrust. 'I really didn't get what I need because you're hiding the ball on me.' That's where the judge is needed – to make sure those things don't happen."

Our discussion ended at the beginning: Rule 1. That's the touchstone for the civil rules, with its mission of "just, speedy, and inexpensive" disposition of federal matters. The revised rules make it explicit that it's very much on the parties to cooperate to achieve that goal. It's a tall order.

"I've heard many people refer to it as aspirational because there is no sanction involved. I think the judges can – discipline is not the right word – *encourage* parties to cooperate now that there's a rule behind them. There's a lot riding on the judges."

Relief from ESI Over-Preservation

Carmen G. McLean / Jones Day

Substantial changes to the Federal Rules of Civil Procedure that govern the preservation of Electronically Stored Information (ESI) in the context of actual or reasonably foreseeable litigation are now in place. Under the amendments to Rule 37(e), which took effect on December 1, a court may not impose relief for failures to provide ESI unless a predicate showing can be made that: 1) ESI that should have been preserved in the anticipation or conduct of litigation is lost; 2) the loss occurred because a party failed to take reasonable steps to preserve it and 3) it cannot be restored or replaced through additional discovery. A court, upon finding prejudice to another party from the loss of ESI, may then order measures no greater than necessary to cure the prejudice. Alternatively, upon finding that a party acted with intent to deprive another party of the ESI, even without a showing of prejudice, a court may impose the more severe measures enumerated under Rule 37(e)(2), presuming or instructing a jury to presume that lost ESI was unfavorable to the party, or dismissing the action. Courts have great discretion in determining which party bears the burden of proof.

Amended Rule 37 applies only to ESI, an area with unique challenges in terms of both cost and logistical complexity. Acknowledging these difficulties, the amended rule requires only that parties take reasonable steps to preserve ESI; perfection is not required. The Judicial Conference's Rules Committee report indicates that curative measures will be unavailable where lost ESI was outside of a party's control or was destroyed by events outside the party's control. Further, the Committee report states that "proportionality," which includes cost and other proportionality factors in amended Rule 26(b)(1), should be considered at multiple stages in the analysis, including when a party devises preservation procedures and when a court considers ordering additional discovery. On the last point, the Committee report cautions that efforts to restore lost ESI should be proportional to the apparent importance of the lost ESI to litigation claims or defenses as substantial discovery measures should not be employed to restore marginal ESI.

Where the predicate showing is made and the loss of ESI did prejudice another party, the amended rule gives courts broad discretion to utilize curative measures. Although the court may employ measures no greater than necessary to cure the prejudice, substantial prejudice may still produce substantial relief. However, the Committee report warns that courts must avoid ordering the relief described under Rule 37(e)(2) unless a finding is made that a party intentionally deprived another party of ESI.

The amended rule thankfully clarifies when a court may impose the more severe relief described in Rule 37(e)(2). To date, courts have required various levels of intent, including bad faith, willful intent and negligence to support imposing these measures. The amendment standardizes these requirements, rejecting case law holding that a showing of mere negligence was sufficient to support an adverse inference instruction. Indeed, the Committee report states clearly that the intent requirement is analogous to a bad faith standard. In this respect, the Committee has probably done much to accomplish its goal of relieving what it described as ESI over-preservation. Litigants need no longer worry that accidental ESI destruction will result in such dramatic relief as an adverse inference instruction. Still, the intermediate curative measures of Rule 37(e)(1) are potent enough that litigants or potential litigants must be thoughtful about their ESI preservation procedures.

Amended Rule 37 seeks to, and hopefully will, cure a number of issues related to the burdens associated with preserving ESI. New issues will certainly develop, and future motions practice related to Rule 37(e) is likely to focus on whether preservation procedures are reasonable, whether lost ESI can be restored through additional discovery, whether the relief imposed by courts is proportional to the ESI lost and whether the relief has the effect of the measures available only under Rule 37(e)(2). For example, the distinction between a jury instruction available under Rule 37(e)(1) and a permissive adverse inference described in Rule 37(e)(2) may be difficult to discern.

Additional information and practical advice about the rules amendments is available at http://bit.ly/1NXdSW4.

Carmen G. McLean, a partner in Jones Day's Washington, D.C., office, was assisted in the preparation of this commentary by Joshua L. Fuchs, a partner in the Houston office and fellow member of the firm's Electronic Discovery Management Team, along with associate Daniel Bleiberg.

Low Profile, High Impact

Karin Scholz Jenson / BakerHostetler

A change to Rule 34 that will likely have a significant impact on future federal discovery practice, but that has gotten far less press than it deserves, is Rule 34(b)(2)(B). The amended version of the rule will now require a responding party not only to either agree to the production as requested or state with specificity the grounds for any objections, but also to provide the *timing* of the production. The amended rule provides that "production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response."

While requiring specificity regarding timing of production may seem like a minor change, its application upends the common, current practice of promising document production without a set delivery date, or rolling productions without specific timelines. The Advisory Committee Comments to the Rule 34 amendments address that practice head-on. The Comments demonstrate the drafters' intent to require a specific document production timeline, and to extend that specificity to staged productions as well, incorporating an expectation that producing parties will also provide beginning and end dates for staged or tiered discovery efforts.

This change alters more than boilerplate response language that previously provided (often intentionally) vague or indeterminate timing of any document production. That is, a requirement for specificity is more than a change in language regarding timing; it also incorporates additional required knowledge. For a responding party to accurately estimate how long it will take to produce requested, unobjectionable information, the responding party must know how long it will take to procure that information, and, depending on the form of production, how long to prepare it (along with any required privilege objections and related logs). This means that the responding party will have to do an early assessment of the electronic sources of data and documents that may contain relevant information, and how long it will take to search and review documents from those sources.

In particular, and consistent with amendments to Rule 26, this change may likewise require the parties to discuss these issues during the Rule 26(f) conference. The Rule 26(f) conference is meant to encourage parties to find some middle ground on discovery issues, and represents one of the best opportunities to agree to a realistic timeframe for specific types or volumes of production. But for parties – and, specifically in this case, producing parties – to sit down and productively discuss production timetables and realistic demands, those parties need to have an intelligent and accurate picture of data volumes and types, as well as those party resources that will be available to assist with a timely review and production of relevant information. A producing party may also use this opportunity to confirm the requesting party's desired form of production, as a court may be unsympathetic to a producing party complaining of the timing required to produce documents or information according to a standard form of requested production.

Nearly every civil case involves some form of document production. And most large, complex commercial cases involve significant volumes of document and data production. Thus, while the proportionality factors and sanction measures under the new rules have deservedly received a lot of attention within the bench and bar, Rule 34(b)(2)(B) may have an even greater impact on the day-to-day practice of civil litigators. The rule amendments were intended as a package, and this can be seen through the amendments to Rule 34(b)(2)(B). Requiring specificity in the timing of production means that parties will necessarily have to address electronic discovery earlier in the process, in order to be able to provide such specificity with responses. This is consistent with one of the overarching themes of the rule amendments – speeding up the timeline of cases and getting parties to discuss electronic discovery issues earlier. Thus, even some of the seemingly more modest changes to the rules may have far-reaching impact when applied against traditional discovery practices.

Karin Scholz Jenson is a Partner at BakerHostetler.

A Discovery Sideshow?

Maureen O'Neill / DiscoverReady

New amendments to the Federal Rules of Civil Procedure took effect on December 1, 2015. One of the most significant amendments redefines the scope of discovery to expressly incorporate the concept of proportionality. Under the new version of Rule 26(b)(1), parties may obtain discovery of "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." Factors to be considered in assessing proportionality 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.

The notion of proportionality – and the specific factors listed – are not new to the rules. In the current version of Rule 26(b)(2)(C), the limits on the scope of discovery include these concepts. But by moving proportionality front and center into the definition of what's discoverable, the Rules Committee hoped to bring greater attention to the concept and ensure more cost-effective, more appropriately tailored discovery.

While the intent of the rule amendment is laudable, DiscoverReady's corporate clients have expressed two main concerns about the application of Rule 26(b)(1). First, corporations with ample resources worry that requesting parties seeking broad discovery will use "the parties' resources" as a bludgeon, and that this factor will outweigh all others. To be sure, it seems somewhat perverse that information discoverable in one case is not discoverable in another, simply because the producing party in the first case has more money in the bank. But this factor currently exists in Rule 26(b)(2)(C), and smart litigators know how to leverage the other factors to prevent disproportionate discovery that is more burdensome than beneficial. Under the new rule, similar arguments will carry the day.

Second, our clients fear that fights about proportionality will generate new motion practice, making discovery more – not less – expensive. Contributing to this worry is the absence of clear guidance in the new rule around which party bears the burden of proving (or disproving) proportionality. According to the Committee Note about the amendment:

> [T]he change does not place on the party seeking discovery the burden of addressing all proportionality considerations. Nor is the change intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional. The parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes.

Some judges expressed this same concern during the amendment drafting process, wondering if their dockets would become clogged with filings about proportionality. But I believe that conscientious judges, with good case management practices, can prevent proportionality fights from becoming a discovery sideshow. They can do so by:

- forcing parties to conduct meaningful, in-person Rule 26(f) conferences and meet-and-confer sessions about discovery disputes (no more "drive-by" meetings and unproductive, poison-pen email exchanges);
- requiring informal submissions to the court about discovery disputes before permitting formal motions and
- insisting on objective, fact-intensive proof around the proportionality factors (and rejecting unsupported conclusions and hyperbole).

In today's corporate environment, with ever-increasing volumes of electronic information flowing into litigation workflows, we need proportionality in discovery more than ever. My hope is that good lawyers – and thoughtful judges – will use the newly amended Federal Rules to bring proportionality to more cases and reduce the burden of litigation for more corporate litigants.

Maureen O'Neill is Senior Vice President at DiscoverReady.

Insofar As Just and Practicable

Mark Euler / Epiq Systems

The FRCP amendments state: "[T]he amendments to the Federal Rules of Civil Procedure shall take effect on December 1, 2015, and shall govern in all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings then pending."

For matters filed on or after December 1, 2015, there will understandably be a learning curve for both attorneys and judges to get accustomed to the impact of some of the amendments; however, at least everyone is on even footing as it relates to understanding that the amendments do, in fact, apply. What is perhaps a greater concern is the application of the new amendments to actions pending as of December 1, 2015 "insofar as just and practicable." Without further guidance, such a standard actually creates potential additional layers of complexity to amendments that were otherwise aimed at creating simplicity and efficiency.

For a starting point, it is not clear what the default position is relating to whether the amendments apply to pending actions. Do they apply unless it can be shown that doing so would be unjust and impracticable? Or do they apply only once it is shown it would be just and practicable? Is there even is a default position?

Whether there is a default position, and what that default position is, makes a significant difference with regard to who has the burden of proof to show that the application is just and practicable. If the default position is that the amendments apply to pending matters, then it puts the onus on the party that believes the amendments should not apply to argue that their application would be unjust and impracticable. While typically once amendments to the rules take effect they apply to all pending matters going forward, which would support an argument that the default position is that amendments apply to pending matters unless it can be shown it would be unjust and impracticable, it seems better language to use if that were the intended default position would be "the amendments to the Federal Rules of Civil Procedure shall take effect on December 1, 2015, and shall govern in all proceedings in civil cases thereafter commenced, and also to all proceedings then pending except where unjust and impracticable to do so."

Regardless of what the default position of the amendments may be, the amendments with the biggest potential impact on pending matters are the discovery-related amendments (e.g., Rules 26, 30, 31, 33, 34 and 37). In a lawyer's role as advocate, he/she will no doubt zealously point to and argue for application of the amendments when they support their client's position (or argue for nonapplication when they do not), which is to be expected. However, by not having any clear guidance as to when the amendments apply, it creates an entirely new and additional phase to a discovery dispute in a pending matter through arguments by one or both sides regarding whether application of one or more of the amendments would be just and practicable. Only after that initial hurdle is resolved will the parties be able to turn to arguments regarding interpretation of the amendments.

For example, let's say you are involved in a discovery dispute on behalf of your client, and you are alleging that the discovery being requested is not proportional to the needs of the case, whether related to costs or otherwise. If the matter is already pending before the court, you will absolutely want to supplement prior arguments to show that the new amendments to Rule 26(b)(1) support your position regarding a claim of proportionality. However, before the impact of the actual amendment can be addressed, the court will need to determine whether applying the amendments to the pending dispute is both just and practicable, which would elicit arguments from both sides on that subject.

Again, while the long-term effect of the amendments should be to reduce the scope of discovery and promote more cost-effective and efficient litigation practices, the short-term impact on pending matters may be to actually introduce further complexity into the discovery process.

Mark Euler is Legal Counsel at Epiq Systems.

Proportionality: Old Wine, New Bottle?

Anthony M. Candido & Sarah A. Sulkowski / Clifford Chance LLP

As discovery burdens have grown under the increasing weight of e-discovery, the revisions to Rule 26(b)(1) represent an effort to emphasize the need for "proportionality" between discovery and the particular circumstances of the case in which it is sought. The revised language to Rule 26(b)(1) is largely familiar, however, and it remains to be seen whether or how it will impact judicial management of discovery and the actual conduct of discovery.

The current version of the rule provides, in relevant part:

> "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense. ... 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)."

Current Rule 26(b)(2)(C)(iii), in turn, requires a court to limit otherwise authorized discovery if it finds that "the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues."

The new Rule 26(b)(1) incorporates the Rule 26(b)(2)(C)(iii) requirements expressly rather than by reference:

"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."

Its substance now subsumed by Rule 26(b)(1), new Rule 26(b)(2)(C)(iii) simply states that the court must limit otherwise authorized discovery upon a finding that it is "outside the scope permitted by Rule 26(b)(1)."

The only truly new language in the revised Rule 26(b)(1) is the word "proportionality" and the addition of "the parties' relative access to relevant information" to the list of factors. As to the former, the Advisory Committee Notes make clear that "proportionality" is a new word for the same obligations: "The considerations that bear on proportionality are moved from present Rule 26(b)(2)(C)(iii), slightly rearranged and with one addition." And as for that addition – the "relative access" factor – according to the Committee, it merely "provide[s] explicit focus on considerations already implicit in present Rule 26(b)(2)(C)(iii)."

The Committee Notes also make clear that the revision is not intended to radically revise the parties' roles: It neither "place[s] on the party seeking discovery the burden of addressing all proportionality considerations" nor "permit[s] the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional."

The "proportionality" language is a change in emphasis, however, and judges may take the revisions as a signal to moderate discovery burdens, particularly in smaller cases (although large institutions involved in significant litigation are unlikely to see much of a change from this revision). In addition, the Advisory Committee has noted its hope that the revisions will encourage courts to take a more active role in managing the discovery process. The Committee has emphasized that because "[t]he parties may begin discovery without a full appreciation of the [proportionality] factors," those issues should "be addressed and reduced in the parties' Rule 26(f) conference and in scheduling and pretrial conferences with the court"—and, if those efforts fail, resolved by the court on discovery motions. And the Notes repeatedly emphasize "the need for continuing and close judicial involvement in the cases that do not yield readily to the ideal of effective party management," a need that has only been "exacerbated by the advent of e-discovery."

Practitioners will be closely monitoring whether the open-ended reference to "proportionality" shifts discovery practice or simply becomes a new way to say the same old thing.

Anthony M. Candido is a Partner & Sarah A. Sulkowski an Associate at Clifford Chance.

The Real Problem: Technology

Dan Regard / iDiscovery Solutions

The rules on proportionality have not changed much in terms of actual language. So why is there so much focus on proportionality now and how do the Duke Guidelines contribute to the discussion?

The most recent round of amendments to the Federal Rules of Civil Procedure were made in an attempt to address complaints about the costs, delays and burdens of civil litigation in the federal courts.

The real problem is technology. Technology is creating, and recording, an unprecedented amount of video, messages, system readings and data points. Everything from the 10,000 Tweets sent, 50,000 Google searches executed, 111,166 YouTube videos watched, and 2,441,806 emails sent *every second*, to the use of digital thermometers, navigation devices and wearable Fitbits that monitor and record so much of the world we live in.

As the use of technology, and the digitalization of our daily lives, has increased, so has the cost of discovery. The extraordinary increase in the use of the Internet, social media and mobile devices has also created a dramatic increase in the types, sources and volume of potential evidence. So much so, that the effort required to identify, collect and manage *all* of the potentially responsive data in a single case can outweigh the value of the case itself.

Therefore, some limits are not only desired, they are mandatory. The rules on scope and proportionality were edited to narrow and clarify the scope of discovery and to emphasize that parties should use proportionality as an initial approach, not as a last resort.

However, while the rules direct parties to act proportionately, they don't give much guidance on how to do so. That's where the Duke Guidelines play a role.

The Duke Conference's "Guidelines and Practices for Implementing the 2015 Discovery Amendments to Achieve Proportionality" have been recently released. These are the result of the efforts of dozens of seasoned practitioners, judges, academicians and technologists. The process purposely included prominent discovery thought leaders from both sides of the bar (plaintiff and defense).

The Guidelines (and commentary) provide a roadmap to understanding the rules, defining some of the terms of art and clarifying which party has which duty, and when. In addition to the five Guidelines are ten Practices that lay out recommended tactics and techniques for developing cost-efficient and proportionate discovery, and for avoiding or resolving discovery disputes.

As society develops new methods of digital communication, and experiences an even greater adoption of mobile technologies, the universe of potentially discoverable information will continue to expand. Proportionality is an effective approach to ensure that resource-constrained parties still have access to the judicial system.

Dan Regard is the CEO of iDiscovery Solutions. As a lawyer and programmer, he has participated in shaping the law, tools and best practices of electronic discovery for over 20 years. He participated in developing the Duke Proportionality Guidelines.

No Time to Relax

Olivia Gerroll / D4, LLC

The 2015 amendment to Rule 37(e) strives to provide a more standardized approach for remedies available by a court when ESI is not properly preserved. Essentially, the amendments provide for a three-part "test" that a court can apply in determining whether ESI was properly preserved and, if not, the penalties available. These are:

- ESI that "should have been preserved in the anticipation or conduct of litigation," is lost,
- because the party "failed to take reasonable steps" to preserve it and
- the loss cannot be remediated through "additional discovery" that would replace or restore the ESI.

If these three conditions are met, then the court needs to determine if there is intent to deprive a party of that ESI. If intent is found, then grave remedies apply: adverse inference as part of a jury instruction, dismissal or default judgment. If there is prejudice but no "intent," then the court will apply a lesser remedy by ordering "measures no greater than necessary to cure."

The effect of this amendment should *not* be interpreted in a way such that the result would deprive either party of important evidentiary materials. In fact, there are highly beneficial results that will provide for potential remedies that will allow for cases to move forward even if there is an "unintended" loss and, as a result, ensures that the discovery process will not be bogged down by these issues. The language "through additional discovery" in fact provides for the ability of the court to order the producing parties to find duplicates of requested ESI through other sources, i.e., backup tapes. The only serious remedies are in relation to "intentional" acts.

A "relaxed" approach should definitely not be a takeaway from this amendment; rather, confirmation that an appropriate but relevant preservation effort should be undertaken if not already in place. The amendment reflects that there is a recognition of the volume. Corporations may take some comfort in preserving more "proportionately" because the severe sanctions are now reserved for only the most egregious abuses.

The amendment is designed to reflect the challenge around the exponential growth of ESI and to provide for a more standard and uniform application of the rule. Additionally the focus is around reasonableness, important again, due to the fact that the volume of data being accumulated is getting to be incomprehensible.

The amended rule is accompanied by the official Committee Advisory Notes that are commonly used to interpret the FRCP. These Notes include the following, which support the "reasonableness" approach that should benefit organizations in understanding their preservation requirements:

Another factor in evaluating the reasonableness of preservation efforts is proportionality.

The court should be sensitive to party resources; aggressive preservation efforts can be extremely costly, and parties (including governmental parties) may have limited staff and resources to devote to those efforts.

A party may act reasonably by choosing a less costly form of information preservation, if it is substantially as effective as more costly forms. It is important that counsel become familiar with their clients' information systems and digital data – including social media – to address these issues.

The approach to development and implementation of preservation policies and best practices do not change in light of the amendments. The same focus around a good faith and reasonable approach remains. Organizations need to focus on protecting themselves by creating and ensuring that there are regularly scheduled and meaningful protocols for deleting unnecessary or outdated ESI. It is expensive, risky and inefficient to store unneeded and unlimited amounts of ESI. Document destruction policies should be developed in good faith, be reasonable, be well-conceived, and have a valid business purpose.

Document destruction policies that are not developed in good faith and result in the deletion of relevant evidence will result in sanctions, dismissal or adverse inference instructions from the judge. As soon as a company anticipates litigation or receives a hold letter, internal protocols must require an immediate hold on the deletion of any ESI from company databases.

Olivia Gerroll, CLSS, CeDP is Vice President, Discovery Engineer at D4, LLC.

Proportion – Not Perfection

Makenzie Windfelder / McCarter & English LLP

The overhaul of Rule 37(e) is intended to address the unintended consequence of what has been described as "massive and costly over preservation." While it will take time to see how courts apply the amended rules, corporate litigants are hopeful that the amendments will curtail the burgeoning costs associated with discovery, specifically over-preservation of Electronically Stored Information (ESI).

While the 2006 amendments aimed to increase proportionality and provide protection against sanctions for loss of ESI, significant inconsistencies in courts' impositions of sanctions left litigants with little guidance regarding what preservation standard would be deemed adequate. As a result, companies over-preserve ESI out of fear of being on the receiving end of adverse inferences or case-terminating sanctions.

The overhaul of Rule 37(e) is intended to address the unintended consequence of what the Committee on Rules of Practice and Procedure called the "massive and costly over-preservation" following the 2006 amendments and to establish uniform guidelines in how federal courts address the loss of discoverable information. (See http://www.uscourts.gov/rules-policies/archives/agenda-books/committee-rules-practice-and-procedure-may-2014.) The amended rule is "designed to ensure that potential litigants who make reasonable efforts to satisfy their preservation responsibilities may do so with confidence that they will not be subjected to serious sanctions should information be lost despite those efforts."

Under the amended rule, for lost information to trigger the possibility of sanctions, the court must first determine that 1) the lost information should have been preserved pursuant to or in anticipation of the litigation, 2) the loss is a result of the party's failure to take *reasonable* steps to preserve it and 3) the information cannot be restored or replaced through additional discovery. If these requirements are met, then the court may impose sanctions if it is found that another party is prejudiced by the loss. The rule directs that curative measures may be *no greater than necessary* to cure the prejudice. Further, imposition of severe sanctions, including adverse inference and terminating sanctions, may be imposed *only* if it is found that the producing party acted with the *intent to deprive* another party of the information's use in the litigation.

The amended rule and the committee's notes reinforce that the standard for preservation is reasonableness, not perfection. Whether a party's preservation protocols are reasonable is fact-specific, but there are practices that corporate litigants can employ to increase discovery defensibility while reducing the expense and risks of over-preservation.

It is imperative for litigants to know what information they possess and to establish a defensible method for determining what information can be destroyed or should be retained. This is especially important for corporate litigants who generate voluminous ESI and requires close collaboration among representatives from the legal, information technology and records-management departments and the business to ensure compliance with regulatory requirements, business need or preservation for litigation.

Establish a records-management program and follow it. Implementing and auditing records-management policies and procedures is critical. If potentially relevant ESI is lost, to avoid sanctions, it may be necessary to determine *why* the loss occurred. Documentation of a company's records-management, information-storage and retention systems is critically important.

Once litigation arises, evaluate its scope and take reasonable steps to ensure that relevant data is preserved, including timely issuance of the Legal Hold. The revised rules limit discovery to "any nonprivileged matter that is relevant to any party's claim or defense and *proportional to the needs of the case*." [Emphasis added.] Litigants generally are obligated to preserve more information than what they will be required to produce, but they should not take a preserve-everything approach, unless the facts necessitate it. Further, over-preservation not only is expensive but puts the company at risk of having to continue to preserve, and ultimately produce, information unrelated to the current litigation, in future matters that arise.

The amended rules require that preservation be addressed early in case management and in the parties' discovery plan. If there are sources the company knows cannot be preserved due to undue burden or expense, raise that issue early. Raising proportionality and the scope of preservation at the outset of litigation will forestall disputes later in discovery, which in complex litigation may be months or years later, after the loss of information may be significant.

Release the Legal Hold. Once a matter concludes, release the Legal Hold in a timely fashion and destroy information in accordance with the company's record-retention schedule.

While the courts' application of the amendments remain to be seen, the principles of reasonableness and proportionality should provide guidance and limit companies' over-preservation of information.

Makenzie Windfelder is a Wilmington, Delaware–based partner at McCarter & English LLP, where she represents pharmaceutical and medical device companies in products liability, patent and antitrust disputes. She serves on the firm's E-Discovery Committee and is a member of the Sedona Conference Working Group on Electronic Document Retention and Production.

Getting to the Heart of the Matter

Aaron Pierce / LexisNexis Litigation Software

Rule 26(b)(1) has been changed, effective December 1, to address issues and concerns growing out of how courts and parties have responded to the 2007 changes to the FRCP. With 26(b)(1), the main thrust is to bring proportionality to the forefront. Litigants should see these changes as a clarion call for early assessment of data, both to meet the spirit of the changes – a renewed focus on proportionality – and to more quickly, effectively and efficiently get to what matters most in a case.

The Rules Committee made six changes to 26(b)(1). First, it added new language to the opening portion of the rule, intended to emphasize that for information to be discoverable, it must be both relevant to a party's claim or defense *and* proportional to the needs of the case. Second, it relocated proportionality factors, placing them immediately after the revised clause. Third, it reworded and reordered the proportionality factors. Fourth, it eliminated as no longer necessary the clause beginning, "including the existence." Fifth, it deleted the provision that "For good cause, the courts may order discovery of any matter relevant to the subject matter involved in the action." Finally, it got rid of the penultimate sentence of the previous version of Rule 26(b)(1), that "[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence," replacing it with "[i]nformation within this scope of discovery need to be admissible in evidence to be discoverable."

For law firms and legal departments, these changes are a caution and an opportunity.

First, the caution. The Committee is admonishing litigants against using e-discovery as a tool to drive up discovery costs and distract opponents and courts from "real" issues. The Committee's concern with over-discovery is not new. As pointed out in the Committee Notes, over-discovery was a problem that the Committee sought to curtail with the amendments it made in 1983, 1993, 2000 and, although the Note does not mention it explicitly, 2007.

Now, the opportunity. Parties feeling burdened with "unreasonable" e-discovery costs should build their discovery strategies to mirror and should design their motion arguments to reflect the structure laid out with these amendments:

- From day one, dig into readily available electronically stored information. If you don't know the scope of your information, you can make only haphazard guesses as to what scope of discovery will make sense.
- Beginning with your earliest discussions and meetings with opposing counsel, emphasize that you intend to contain and constrain the scope of discovery, especially e-discovery. Be as specific and detailed as you deem appropriate – which probably should be more specific and detailed than you are comfortable with.
- In these discussions and meetings, make good use of the six proportionality factors delineated in 26(b)(1): importance of the issues at stake in the action; amount in controversy; relative access to relevant information; parties' resources; importance of the discovery in resolving the issues; and burden and expense versus likely benefit. As you use these factors, keep in mind that they are listed, more or less, in descending order of importance.
- Document what you have done. This is best done via a written communication sent to the other side, shortly after the discussion or meeting, setting forth what you discussed, what you were able to agree upon and what you could not resolve. Should there be a dispute later on, the contemporaneous documentation can help you considerably.

Do you want to pursue more expansive discovery rather than curtail the scope of discovery? Each of the suggestions above has a flip side to it that you can pursue.

As you work through this process, remember the venerable adage that what is sauce for the goose is sauce for the gander. Don't expect much sympathy from a court if you have been trying to severely limit the scope of discovery the other side gets from you while also attempting to place substantial discovery burdens on your opponent.

It remains to be seen, of course, what impact these changes actually will have. If history is a guide, there will be much confusion, a low early adoption rate and many attempts to circumvent the changes. For law firms and legal departments that study the rules changes carefully and follow the leads set out in them, however, good things can happen.

Aaron Pierce is Director of Product Management at LexisNexis Litigation Software.

Changes Favor Well-Prepared Parties

Tom Spaulding / Inventus LLC

The overarching goal of the amendments is to make e-discovery more efficient with less delay. Perhaps no other rule has more impact on the overall goal than the revisions to Rule 16, since it occurs at the onset of litigation. There are two key components:

Timeline: Rule 16(b)(2) aims to accelerate the issuing of a scheduling order to 90 days or less (down from 120) from the date the complaint is served, unless the judge finds good cause for delay. If a defendant has appeared, then the timeframe is within 60 days (down from 90).

Communication: Rule 16 (b)(1)(B) drops criteria for a scheduling conference to take place either by "telephone, mail, or other means." The Committee Notes emphasize having all parties communicate "in direct simultaneous communication." In addition, 16(b)(3)(B)(v) states that before "moving for an order relating to discovery, the movant must request a conference with the court." Rule 16(b)(3) allows discussion of ESI preservation and party agreements under Rule of Evidence 502.

In summary, Rule 16 presents a consolidated timeline, with high-stakes conferences early on in matters with an increase in court participation. As corporate counsel, there are a few things you can do to position yourself to take advantage of the changes.

The accelerated timelines require the ability to quickly identify your potential ESI sources not only to take control of the scheduling conference but also to prepare to discuss proportionality and the scope of discovery found in Rule 26. Having access to in-depth knowledge of your data sources coupled with the ability to quickly access and assess data will allow counsel to attend the scheduling conference prepared.

Having performed some Early Case Assessment (ECA) prior to the scheduling conference or 26(f) conference can be vital to determining case strategy. Where does the data reside? Is there anything not easily accessible, such as archived or international data? What is in the data? What is the risk assessment of the matter? What are the potential costs of discovery and review?

In order to respond to these questions, corporations need to have a plan of action to be able to quickly assess data in a timely and cost-effective manner. Some corporations will have internal resources available to accomplish a portion or all of their ECA while others can benefit from establishing a relationship with a service provider. A service provider, regardless of which stage it is brought in, should be able to familiarize itself with your organization's data and develop defensible and repeatable workflows to allow counsel – either in-house or outside – to perform the necessary analysis required.

When the scheduling conference occurs, it can be advantageous to include an e-discovery specialist in attendance to avoid surprises or gamesmanship later on in the matter. The rules aim to curb gamesmanship, fishing expeditions and the like, but companies can be susceptible if they're not prepared – and not just from opposing counsel. While judicial interpretation of the rules is undetermined at this stage, judges will likely emphasize competence in conferences, particularly if they're involved in the meetings. Not being prepared is one way to fall out of favor quickly.

I believe the amended rules represent a positive change on a whole, but they essentially stress existing best practices. Corporations that have their ESI house in order with well-defined and adhered to data retention policies and are proactive with ECA should be able to benefit the most and take advantage of the efficiency and faster timelines in the new rules.

Tom Spaulding is Managing Shareholder, Northern California at Inventus. He entered the discovery space shortly after the 2006 Federal Rules of Civil Procedure went into effect. In the eight-plus years since, Spaulding has gained extensive hands-on experience working with clients in project management and discovery consultant capacities. He interfaces primarily with corporate legal teams to streamline their discovery processes and reduce the cost and risk associated with discovery. Spaulding is a Certified E-Discovery Specialist.

Gear Up for Acceleration and Collaboration

Mark E. McGrath / Sheppard Mullin Richter & Hampton LLP

The amendments to FRCP 4, 16, 26 and 34 accelerate case deadlines and are intended to require a party to address discovery at a very early juncture in the action, encourage collaboration between the parties and result in more interaction with the court. A party that fails to attempt to act proactively and collaborate with its adversary is more likely to be on its heels in the action and may not be able to capitalize on other amendments to the rules, such as the proportionality requirements.

In most cases, the amendments require parties to actively work with their counsel to locate documents, Electronically Stored Information and witnesses in a more expedient manner. The accelerated deadlines begin with the change in Rule 4(m) that establishes a 90-day presumptive limit to serve the summons and complaint on U.S.-based defendants. This change was made in conjunction with the changes to Rules 16 and 26 to increase the speed at which the parties commence discovery. Rule 16(b)(2) requires that the court issue a scheduling order within the earlier of 90 days after any defendant has been served or 60 days after any defendant appears, unless the judge finds "good cause" for a delay. While the rules do not define "good cause," the Advisory Committee Notes suggest that "good cause" includes actions that are complex, have many parties or involve large organizations that may need additional time in order to have meaningful discussions relating to scheduling and discovery. While the deadline to hold a Rule 26(f) conference has not changed, the changes to Rules 4 and 16 mean that the parties will be required to begin the Rule 26(f) conference no later than 69 days after a party has been served or 39 days after a defendant appears.

As a result of these changes, there are potentially 60 fewer days after an action has commenced for a party to identify witnesses and potentially relevant information. Thus, a party and its counsel has to be proactive to determine what people or entities are in possession of potentially relevant information in order to be prepared for the Rule 26(f) conference or, alternatively, to apply for an extension of time relating to the Rule 16 conference. If a party is not proactive, it may face difficulty meeting the "good cause" standard to delay the Rule 16 conference because that party likely will not have sufficient facts to demonstrate "good cause." Given that a party would want to seek the extension prior to the deadline, a party will have to act expeditiously in order to make the application and obtain a ruling prior to the expiration of the 39-day period. If a party elects not to make such an application, the requirements for Rule 26(f) conferences and the Rule 16 conference mandate that a party be prepared to discuss many of the issues that would form the basis of making the "good cause" application. Therefore, the need to work quickly likely applies in all cases.

The amended rules seek to encourage collaboration and cooperation among the parties. Rule 26(d)(2) allows a party to "deliver" document requests to the plaintiff or any party that has been served with the summons and complaint if more than 21 days have elapsed since the papers were served on a party. The requests are not deemed "served" until the first Rule 26(f) conference therefore, responses are due 30 days after that conference, unless the parties stipulate to another deadline. By delivering document requests before the Rule 26(f) conference, the parties should be in a better position to address preservation, proportionality and the scope of discovery at the conference. The reason is that a party will be able to discuss the requests internally and be able to identify any potential issues with the requests prior to the entry into a discovery plan or the entry of the scheduling order. A party that fails to deliver documents requests before the Rule 26(f) conference may be at a disadvantage because it may not be aware of its adversary's position. The changes to Rule 34 also seek to increase collaboration because they require objections to document requests to be stated with specificity and identify any materials withheld. These changes also will likely lead to agreements to further extend the time to respond to discovery requests, especially in light of the potential requirement that a court conference be held prior to making a motion to compel or for a protective order.

The amended rules also seek to encourage interaction with the court because the Advisory Committee believes that interaction leads to more effective results. The amendment to Rule 16(b)(3)(B)(v) permits a court to include a provision mandating that a party request a conference before moving for an order relating to discovery. This may eliminate the need for formal motion practice, which might result in a reduction in the amount of time and money spent relating to discovery. If a court elects to hold a scheduling conference (as opposed to accepting the proposed order submitted by the parties), Rule 16(b)(1) requires that the conference be held either in person or by telephone or videoconference.

The 2015 amendments to the rules are likely to lead to increased costs and expenses for parties at the outset of an action. A party and its counsel that are proactive may be able to offset the increased costs (or even save money) through active case management and technology.

Mark E. McGrath is a Partner at Sheppard Mullin Richter & Hampton LLP.

Early and Often

Salvatore Mancuso / RVM Enterprises, Inc.

Having worked in this industry for as long as I have, the amended Federal Rules of Civil Procedure introduced in 2006 made complete sense to me. The spirit of the changes back then echoed a movement of acting early and often. The latest changes continue to reflect this idea. Rules 4 and 16 in particular speak volumes.

Rule 4 introduces a shortened time period for a party to serve a defendant with a summons and complaint. The proposed amendment reduces the 120-day time period to 90 days. This change is intended to reduce delays at the beginning of litigation. The Committee originally proposed a 60-day period; however, after considering public comment on the issue, the Committee recommended the 90-day limit.

As a result of the change to Rule 4, three types of changes were proposed for Rule 16:

In the first, the Committee recommends that Rule 16(b)(1)(B) be amended. Currently, Rule 16 says "after consulting with the parties, attorneys and any unrepresented parties at a scheduling conference or by telephone, mail, or other means." The recommendation removes the phrase "or by telephone, mail, or other means." The Committee Note adds that the conference may be held by any "direct simultaneous communication," and Rule 16(b)(1)(A) still allows a scheduling order to be based on the parties Rule 26(f) report without holding a conference. That said, the change to the text of the rule is intended to encourage judges to participate directly with the parties early on in the litigation process.

The second change shortens the time frame for holding the scheduling conference. The Rule 16(b)(2) currently allows for the conference to be held at the earlier of 120 days after any defendant is served or 90 days after any defendant has appeared. The proposed amendment reduces the number of days to 90 days after any defendant is served or 60 days after any defendant has appeared. Judges are allowed to set a later date with a finding of good cause. The purpose of this change is to encourage judges to engage in early case management.

In the third change, the proposed amendment adds three new elements to the list of permitted contents in a scheduling order:

- The first element pertains to the preservation of Electronically Stored Information (ESI). ESI has become a prevalent challenge in litigation, and the issues of preservation of ESI must be considered.
- The second element speaks to agreements reached under Federal Rule of Evidence 502. Rule 502 deals with the reduction of expense in producing ESI and other documents. By adding these two elements, the Committee is encouraging parties to consider the application of these issues early in the litigation process.
- The third element addresses the parties' requirement to request a conference with the court before filing discovery requests. Many federal judges currently require such a premotion conference because it can facilitate the resolution of discovery disputes.

The amended Rules 4 and 16 seek to increase awareness of ESI issues, invite parties to get involved in the discussion of these ESI issues sooner rather than later and empower the bench to play a more active role in the resolution of the matter at hand. Most importantly, it is the expectation of the court that parties carry out the responsibility to meet and confer early and often.

Salvatore Mancuso is Managing Director at RVM Enterproses, Inc.

Contributors

Anthony Candido
Clifford Chance LLP
anthony.candido@cliffordchance.com

Mark Euler
Epiq Systems
meuler@epiqsystems.com

Olivia Gerroll
D4, LLC
ogerroll@D4discovery.com

Karin Scholz Jenson
BakerHostetler
kjenson@bakerlaw.com

Sal Mancuso
RVM Enterprises, Inc.
smancuso@rvminc.com

Mark McGrath
Sheppard Mullin Richter & Hampton LLC
mmcgrath@sheppardmullin.com

Carmen McLean
Jones Day
cgmclean@jonesday.com

Maureen O'Neill
DiscoverReady
maureen.oneill@discoverready.com

Aaron Pierce
LexisNexis Litigation Software
aaron.pierce@lexisnexis.com

Dan Regard
iDiscovery Solutions
dregard@idiscoverysolutions.com

Tom Spaulding
Inventus LLC
tspaulding@inventus.com

Sarah Sulkowski
Clifford Chance LLP
sarah.sulkowski@cliffordchance.com

Makenzie Windfelder
McCarter & English, LLP
mwindfelder@mccarter.com