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Amendments to the Federal Rules of Civil Procedure Aim to Reduce the Costs and Burdens of Discovery

Organizations involved in litigation—as well as those navigating their obligation to preserve information for potential litigation—are likely to benefit from the proposed amendments to the Federal Rules of Civil Procedure (FRCP) that should take effect next year.

The Committee on Rules of Practice and Procedure (known as the “Standing Committee”) voted on May 29, 2014, to approve a package of FRCP amendments aimed at reducing the costs and burdens of discovery. The two most important of these are a revision to Rule 26(b)(1), which re-defines the scope of discovery, and a re-write of Rule 37(e), which regulates sanctions for failure to preserve discoverable information. The proposed amendments also include changes to rules 1, 4, 16, 26, 30, 31, 33, 34, and 37.



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The Standing Committee’s approval followed a thorough multiyear review of discovery rules by the Advisory Committee on Civil Rules and a six-month public comment that included more than 120 testifying witnesses and more than 2,300 written comments.

Here are some key points about the proposed amendments:

Rule 26(b)(1)

The proposed amendment to Rule 26(b)(1) would re-define the scope of discovery to be “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.” The amendment deletes the well-known but overbroad phrase “reasonably calculated to lead to the discovery of admissible evidence,” as well as the “subject matter involved in the action” from the scope of discovery in order to make clear that discovery is defined by the claims and defenses identified in the pleadings. This change would provide a meaningful improvement compared to the current standard, which is a fundamental cause of the high costs and burdens of modern discovery.

Rule 37(e)

The proposed new Rule 37(e) would, for the first time, establish a uniform national standard for measures that courts can impose for a party’s failure to provide electronically stored information (“ESI”). It rejects the negligence standard that some courts, including the Second Circuit, currently allow as a basis for sanctions. Under the proposed rule, a court would have to find “the intent to deprive another party of the information’s use in the litigation” before employing the most serious measures, including: presuming the loss was unfavorable to the party; instructing the jury that it may or must presume the information was unfavorable to the party; or dismissing the action or entering a default judgment. Lesser measures are available where the loss of ESI causes prejudice to a party, but only where the

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information “should have been preserved” and “cannot be restored or replaced through additional discovery”—and those measures must be “no greater than necessary to cure the prejudice.” This proposal holds great promise to protect litigants from today’s patchwork approach to sanctions for failure to preserve ESI and to curtail costly over-preservation and ancillary litigation over allegations of spoliation. The proposed rule differs substantially from the current Rule 37(e), which purports to bar sanctions only where ESI is lost due to the good faith operation of an electronic information system.

Other Proposals

The package of FRCP proposals includes an amendment to Rule 1 that would clarify that “parties” share the responsibility to administer the FRCP “to secure the just, speedy and inexpensive determination of every action and proceeding.” It also includes a proposed amendment to Rule 34 requiring parties who opt to produce copies (rather than permit inspection) of documents or ESI to produce those copies within the same time specified for inspection. The Rule 34 amendments would also require parties who object to discovery requests to state whether any responsive materials are being withheld on the basis of each objection.

Following considerable criticism during the public comment period, the Advisory Committee withdrew its proposed FRCP amendments that would have reduced the presumptive limits of depositions under Rules 30 and 31 and interrogatories under Rule 33; changed the duration of depositions from seven hours to six; and created a presumptive limit of 25 for Rule 36 requests to admit.

What Happens Next?

The Judicial Conference will consider the proposed FRCP amendments in September and decide whether to forward them to the Supreme Court. If the Supreme Court approves the amendments by May 1, 2015, then they will take effect in December 2015 unless Congress rejects them.

Alex Dahl, a shareholder in **Brownstein Hyatt Farber Schreck**’s Washington, D.C., office, is general counsel to Lawyers for Civil Justice, a national coalition of corporate and defense lawyers that is engaged in the FRCP amendment process to further LCJ’s goals to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) promote more predictability and efficiency in litigation.

This document is intended to provide you with general information regarding amendments to the Federal Rules of Civil Procedure. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact the attorney listed below or your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions.

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