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E-Discovery in Employment Litigation: Preparing for New FRCP Amendments on Proportionality and ESI

Strategies for Preserving, Obtaining and Protecting ESI

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Strafford Legal Webinars
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E-Discovery in Employment Litigation
Preparing for New FRCP Amendments on Proportionality and ESI

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The pending amendments to the Federal Rules of Civil Procedure, effective December 1, 2015, include a number of provisions designed to work together to ensure efficient litigation, and to reduce time-consuming delays in the discovery process. Although it remains to be seen how well these amendments will work to reduce the time and expense of discovery, their intent evidences a clear desire on the part of the federal judiciary to maximize planning and cooperation among the parties and the court before discovery commences, in order to save time and effort expended by the judiciary to resolve discovery disputes. These amendments originated with the conference held by the Advisory Committee on the Civil Rules, at Duke University Law School in May 2010, with a number of subsequent conferences held over the ensuing five years.

This chapter focuses on the amendments to Rules 1, 4(m) (time for service of process), 16(b) (initial scheduling conference and order), 26(d)(2) (early service of document requests), 26(f) (discovery meet-and-confer in advance of the scheduling conference), and 34(b) (responding and objecting to document requests).

I. Rule 1, "Scope and Purpose."

Rule 1 – which is unlikely to have been previously cited in a discovery motion – currently states that the Federal Rules of Civil Procedure "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."

The amended version of Rule 1 now provides that the FRCP "should be construed, administered, *and employed by the court and the parties*, to secure the just, speedy, and inexpensive determination of every action and proceeding" (new language in italics). The amendment makes clear that the court and the parties have to work together to achieve the goals of the Federal Rules.

However, the Advisory Committee Notes state that "This amendment does not create a new or independent source of sanctions. Neither does it abridge the scope of any other of these rules." Thus, this amendment to Rule 1 may be aspirational, at best.

II. Rule 4(m), Time Limit for Service of Process.

Rule 4(m), which governs the time for serving domestic defendants with the summons and complaint, currently allows 120 days for service of process, and allows the plaintiff to seek additional time upon a showing for good cause. The 2015 amendment to Rule 4(m) shortens this time period to 90 days, while retaining the ability to extend that time upon a showing of good cause.

The Advisory Committee Notes recognize the trade-off inherent in this amendment:

> 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.
>
> Shortening the presumptive time for service will increase the frequency of occasions to extend the time for good cause. More time may be needed, for example, when a request to waive service fails, a defendant is difficult to serve, or a marshal is to make service in an *in forma pauperis* action.

Our experience is that most plaintiffs' counsel want to serve the defendants promptly, so that the deadline in Rule 4(m) seldom applies. However, there can be

problems with defendants who are deliberately evading service, or are otherwise difficult to locate, so that more time may be needed in some cases.

III. The Rule 16 Scheduling Conference.

Rule 16 sets forth a detailed protocol for the initial pretrial conference, at which scheduling of discovery and related protocols governing discovery are to be discussed. However, there was a recognition among the judiciary and attorneys that discovery problems could be forestalled or mitigated if the Rule 16 discovery conference could be held earlier, and if this conference would address with greater specificity the discovery issues that are likely to come up in civil litigation. The result of these changes to Rule 16 is to require the parties to devote much more effort to planning the scope of discovery up front.

Currently the Rule 16 discovery conference may only address discovery issues in the abstract, if the parties have not discussed the discovery concerns specific to a given case. If a Rule 16 conference is held before the parties have discussed where and how the paper and electronic documents are currently stored, the appropriate records custodians, how these documents can be searched, what search terms or search methods should be used, the format for document production, and the preservation obligations for each party, then the parties will likely have to return to court later in the discovery process, sometimes multiple times, to resolve disputes.

In contrast, if the parties discuss these discovery issues with each other prior to the Rule 16 conference, and engage in a joint discussion with the court at the Rule 16 conference, then the court and the parties will have the opportunity to address these issues at the outset, which may lead to fewer discovery disputes during the litigation.

The court's Rule 16 discovery order should provide sufficient detail to the parties so that there will be no doubt as to their discovery obligations. The result should allow the parties to move promptly into discovery, as the court will already have resolved disputes as to the scope of searching for and producing responsive information. Rule 16 is also intended to limit the need for motions to compel as to procedural issues, so that discovery motions ideally need only address substantive issues relating to discovery into the claims and defenses.

Rule 16(a), setting forth the five purposes of the pretrial conference, remains unchanged.

Rule 16(b), setting forth the timing and contents of the scheduling order, is amended as follows:

Rule 16(b)(1)(B), which currently allows for a scheduling conference to take place either in person, or "by telephone, mail, or other means," is amended to delete the latter phrase. While a telephone conference is still permissible, the Advisory Committee Notes state that "A scheduling conference is more effective if the court and parties engage in direct simultaneous communication," which can be either in person or by telephone. This should do away with the practice of a judge simply rubber-stamping a proposed scheduling order, and will encourage judges to have an engaged discussion with the attorneys about each of the issues covered by the scheduling order.

Rule 16(b)(2) currently provides that the "judge must issue the scheduling order as soon as practicable," either within 120 days after any defendant has been served, or 90 days after any defendant has appeared. The 2015 amendments shorten this time period to 90 days after any defendant has been served, or 60 days after any defendant has appeared. This shorter time period, combined with the shorter period for service of process, should expedite discovery. However, if the defendants have filed a motion to dismiss, then discovery (including issuing the scheduling order) is usually stayed pending resolution of that motion.

Rule 16(b)(3)(A) currently requires that the scheduling order "must limit the time to join other parties, amend the pleadings, complete discovery, and file motions." This provision remains unchanged.

However, Rule 16(b)(3)(B), which currently sets forth six categories of discovery issues that <u>may</u> be included in the scheduling order, has been amended with respect to three of these discretionary categories:

Rule 16(b)(3)(B)(iii) is amended to provide that the scheduling order may "provide for disclosure, discovery, *or preservation* of electronically stored information" (new language in italics). This amendment alerts the parties and the courts to the need to discuss ESI preservation issues at the outset of discovery, and should reduce disputes over destruction or inadvertent loss of ESI during the course of discovery.

Rule 16(b)(3)(B)(iv), which currently addresses agreements for asserting privilege claims, is amended to reference clawback agreements under Rule 502,

Federal Rules of Evidence: "include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, *including agreements reached under Federal Rule of Evidence 502*" (new language in italics). Rule 502, enacted in 2008, codifies the common law of waiver of attorney-client privilege and work product, and does so in a way that can limit the scope of the waiver, particularly with respect to inadvertent disclosures. Rule 502(d) allows the court to "order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court – in which event the disclosure is also not a waiver in any other federal or state proceeding," and Rule 502(e) provides that an agreement among the parties as to the "effect of disclosure … is binding only on the parties to the agreement unless it is incorporated into a court order." Thus, the amendment to Rule 16(b)(3)(B)(iv) makes clear that the scheduling order can address waiver and clawback provisions under FRE Rule 502, and alerts the court and the parties to the desirability of resolving these issues at the earliest possible stage.

The third change to Rule 16(b)(3)(B) is the addition of a new provision, Rule 16(b)(3)(B)(v), which provides that the scheduling order may "direct that before moving for an order relating to discovery, the movant must request a conference with the court."

Although many district courts require a "pre-motion conference" before the filing of a motion to compel, this provision will encourage all district judges to adopt this practice. Under this procedure, a judge can require that the party seeking leave to file a motion to compel file a short letter summarizing the discovery dispute and outlining the factual and legal justifications, and the party opposing the discovery will then file a short response, with both documents submitted on a much faster briefing schedule than for a regular motion. The court will hold an in-person or telephonic conference, perhaps handled by a magistrate judge. Ideally, the discovery dispute can be promptly resolved based upon the letters and the conference, without requiring full briefing on motions to compel.

This change to Rule 16, encouraging a pre-motion conference, should further serve to expedite discovery, as the parties can obtain a prompt ruling from the court in a matter of days, as opposed to the weeks or even months it may take to brief a formal motion to compel and to get a ruling. The Advisory Committee Notes explain that "Many judges who hold such conferences find them an efficient way to resolve most discovery disputes without the delay and burdens attending a formal motion, but the decision whether to require such conferences is left to the discretion of the judge in each case."

The rest of Rule 16 governs both the pretrial conference (*i.e.*, the conference held after the close of discovery but before trial), and sanctions relating to violations of Rule 16. Those provisions remain unchanged.

IV. Rule 26(d)(2) – Early Delivery of Requests for Production.

Under the current Federal Rules, discovery requests cannot be served until after the parties have had met and conferred about discovery issues. Rule 26(f) currently requires the parties to have a meet-and-confer session about discovery issues "at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b)."

Rule 26(d) is amended to allow the service of document requests under Rule 34 (but not interrogatories or requests for admission) in advance of the parties' Rule 26(f) meet-and-confer, but with the effective date of service of the document requests being the date of "the first Rule 26(f) conference."

The rationale for allowing the parties to submit document requests in advance of their meet-and-confer is that if each side can see what the other side is seeking in document discovery, then the parties can have an up-front discussion of how best to approach discovery. For example, knowing what is being sought will allow the parties to discuss appropriate records custodians, search terms and methods, categories of documents, and privilege issues. Further, this may allow the parties to modify the document requests in order to expedite the search, review, and production of documents. The Advisory Committee Notes state that: "This relaxation of the discovery moratorium is designed to facilitate focused discussion during the Rule 26(f) conference. Discussion at the conference may produce changes in the requests."

This amendment should also lead to a much more informed discussion of discovery issues with the court at the Rule 16 scheduling conference, since each party will have a better grasp of what the other side is seeking in discovery, and will have had the opportunity to discuss these issues with their client.

V. Rule 26(f)(3) – Preservation and Clawback Issues.

Rule 26(f)(3) requires the parties to prepare a discovery plan that "must state the parties' views and proposals" on six discrete topics to be addressed at the Rule 16(b) scheduling conference. This mandatory rule is amended to be consistent

with the aforementioned amendments to Rule 16(b)(3).

First, the discussion of ESI in the discovery plan must include preservation of ESI: "any issues about disclosure, discovery, *or preservation* of electronically stored information, including the form or forms in which it should be produced." Rule 26(f)(3)(C) (new language in italics).

Second, the discussion of claims of privilege in Rule 26(f)(3)(D) now includes a cross-reference to Federal Rule of Evidence 502.

These amendments should expedite discovery in ensuring that the parties will address ESI preservation and privilege waiver/clawback issues during the Rule 26(f) meet-and-confer, and in advance of the Rule 16(b) scheduling conference. This will also allow the parties and their counsel to discuss the email systems used by the employer, and to focus on the best methods for searching and reviewing those emails. Since ESI can be the most time-consuming and contentious part of discovery in employment litigation, this amendment should give the parties an opportunity to discuss these issues up front, before devoting their resources to the discovery and review of ESI.

VI. Rule 34(b)(2) – Responses to Document Requests and Production.

Finally, Rule 34(b)(2), which governs responding to document requests and the production of documents, is amended, again with the goal of streamlining and expediting the discovery process.

Rule 34(b)(2)(B) currently states that when responding to a given document request, "the response must either state that inspection and related activities will be permitted as requested or state an objection to the request, including the reasons." Rule 34(b)(2)(C) states that "An objection to part of a request must specify the part and permit inspection of the rest." These two provisions allowed parties to assert numerous, boilerplate objections to each document request, and leave the other side in the dark as to whether documents actually were being withheld because of any given objection.

In response, the amended Rule 34(b)(2) now provides:

> (B) Responding to Each Item. For each item or category, the response must either state that inspection and related activities will be permitted as requested or state with specificity the grounds for objecting to the request,

> including the reasons. *The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.*
>
> (C) Objections. *An objection must state whether any responsive materials are being withheld on the basis of that objection*. An objection to part of a request must specify the part and permit inspection of the rest.

Rule 34(b)(2)(B), (C) (new language in italics). For example, while a party can still object that a given document request is overbroad or unduly burdensome, the party will have to specify whether it is actually withholding documents or limiting the size of its response based on that objection. This will avoid litigation over boilerplate objections, and will prevent a party from withholding documents on the basis of numerous unjustified, boilerplate objections.

Similarly, a party could specify that it limited its search to certain records custodians, or used specific search terms, thereby alerting the requesting party that the search did not include documents that fall outside the scope of that search protocol.

The Advisory Committee Notes for this amendment make clear that generic, boilerplate objections are now disfavored:

> The specificity of the objection ties to the new provision in Rule 34(b)(2)(C) directing that an objection must state whether any responsive materials are being withheld on the basis of that objection. An objection may state that a request is overbroad, but if the objection recognizes that some part of the request is appropriate the objection should state the scope that is not overbroad. Examples would be a statement that the responding party will limit the search to documents or electronically stored information created within a given period of time prior to the events in suit, or to specified sources. When there is such an objection, the statement of what has been withheld can properly identify as matters "withheld" anything beyond the scope of the search specified in the objection.

Of course, if the parties have already reached an agreement as to the scope of discovery at the Rule 26(f) meet-and-confer, or the court's Rule 16(b) scheduling order addresses the scope of discovery, then a party should not need to assert such

objections in response to a document request, although it is likely that large corporate defendants will continue to do so.

The new language in Rule 34(b)(2)(B) also encourages the current practice of producing documents and ESI directly to the other side, as opposed to making them available for inspection and copying.

VII. CONCLUSION.

The December 2015 amendments to Rules 1, 4(m) (time for service of process), 16(b) (initial scheduling conference and order), 26(d)(2) (early service of document requests), 26(f) (discovery meet-and-confer in advance of the scheduling conference), and 34(b) (responding and objecting to document requests) should serve to expedite the discovery process.

These amendments require the parties and the court to address key discovery issues as early as possible in the litigation, so that once discovery commences, the parties ideally can focus on the merits of the claims and defenses, instead of having to litigate procedural issues relating to discovery. However, these changes also put a greater up-front burden on plaintiffs (employees) because plaintiffs generally have fewer resources, yet plaintiffs are the ones who most need access to all of their employer's documents, in contrast to employers who can cherry-pick their own exculpatory documents.