



Small Step or Giant Leap?

The 2015 Amendments to the Federal Rules of Civil Procedure

December 16, 2015

Introduction

Panelists:

Honorable Paul W. Grimm,
United States District Judge,
District of Maryland



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Case Management

The amended rules promote early and active case management by:

- Shortening timeframes for:
 - serving process;
 - holding Rule 16 Scheduling conferences (and, therefore, Rule 26(f) conferences); and
 - issuing scheduling orders.
- Promoting direct interactions between the court and parties.
- Facilitating more effective Rule 26(f) conferences.

Case Management: Early Case Management (Rules 1 and 16(b)(1))

Rule (1) Scope and Purpose.

[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.

Rule 16(b)(1) Scheduling Order.

“The provision for consulting at a scheduling conference ‘by telephone, mail, or other means’ is deleted. A scheduling conference is more effective if the court and parties engage in direct simultaneous communication.”

(2015 Advisory Committee Note to FRCP 16.)

Case Management: Pre-Motion Discovery Conference (Rule 16(b)(3))

Contents of the Order.

(B) Permitted Contents. The scheduling order may:

(v) direct that before moving for an order relating to discovery, the movant must request a conference with the court;

“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.”

(2015 Advisory Committee Note to FRCP 16.)

Case Management: Scheduling and Discovery Conferences (Rules 16(b) and 26(f))

Rules 16(b) and 26(f) provide that the parties' scheduling order and discovery plan may provide for:

- **Preservation of electronically stored information**, including the form or forms in which it should be produced.
- An order **under Federal Rule of Evidence 502**.

(FRCP 16(b)(3)(B) and 26(f)(3).)

Case Management: Scheduling Order (Rule 16(b)(2))

Time to Issue. The judge must issue the scheduling order as soon as practicable, but in any event **unless the judge finds good cause for delay, the judge must issue it** within the earlier of **90** days after any defendant has been served with the complaint or **60** days after any defendant has appeared.

“This change, together with the shortened time for making service under Rule 4(m), will reduce delay at the beginning of litigation. At the same time, a new provision recognizes that the court may find good cause to extend the time to issue the scheduling order.”

(2015 Advisory Committee Note to Rule 16.)

Discovery Practices

The amended rules:

- Emphasize the parties' shared responsibility to cooperate to secure just, speedy, and inexpensive resolutions.
- Limit the scope of discovery to be:
 - proportional to the needs of the case; and
 - relevant to any party's claim or defense.
- Require parties objecting to document requests to:
 - object with specificity; and
 - state whether documents are being withheld on the basis of an objection.

Discovery Practices: Using the Rules (Rule 1)

[The 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.

“Rule 1 is amended to emphasize that ... the parties share the responsibility to employ the rules in the same way. Most lawyers and parties cooperate to achieve these ends. ... **Effective advocacy is consistent with – and indeed depends upon – cooperative and proportional use of procedure.**”

This amendment does not create a new or independent source of sanctions. Neither does it abridge the scope of any other of these rules.”

(2015 Advisory Committee Note to FRCP 1.)

Discovery Practices: Scope of Discovery (Rule 26(b)(1))

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.

Discovery Practices: Scope of Discovery (continued) (Rule 26(b)(1))

- “Restoring the proportionality calculation to Rule 26(b)(1) does not change the existing responsibilities of the court and the parties to consider proportionality, and the change does not place on the party seeking the discovery the burden of addressing all proportionality considerations.”
- “Framing intelligent requests for electronically stored information...may require detailed information about another party’s information systems and other information resources.”
- “The direction to consider the parties’ relative access to relevant information adds new text to provide explicit focus on considerations already implicit in” the former rule.
- “Computer-based methods of searching [ESI] continue to develop, particularly for cases involving large volumes of [ESI]. Courts and parties should be willing to consider the opportunities for reducing the burden or expense of discovery as reliable means of searching [ESI] become available.”

(2015 Advisory Committee Note to FRCP 26.)

Discovery Practices: Objecting to Document Requests (Rule 34(b)(2))

Responses and Objections.

(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 an objection **with specificity the grounds for objecting** to the request, including the reasons.

(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 party and permit inspection of the rest.

A party may not “refuse discovery simply by making a boilerplate objection that it is not proportional.” (*2015 Advisory Committee Note to FRCP 26.*)

“The producing party does not need to provide a detailed description or log of all documents withheld but does need to alert other parties to the fact that documents have been withheld and thereby facilitate an informed discussion of the objection.” (*2015 Advisory Committee Note to FRCP 34.*)

ESI Preservation

Rule 37(e) establishes a uniform sanctions regime for the loss of ESI that:

- Encourages parties to behave reasonably when negotiating ESI preservation.
- Affords courts considerable discretion in fashioning relief for a party prejudiced by ESI loss.
- Eliminates disparities among the federal courts on imposing severe sanctions.

ESI Preservation: Scope of Discovery (Rule 26(b)(1))

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.
- Whether the burden or expense of the proposed discovery outweighs its likely benefit.

(FRCP 26(b)(1).)

ESI Preservation: Sanctions for ESI Loss (Rule 37(e))

*Failure to **Preserve Electronically Stored Information.** 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 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.**

ESI Preservation: Sanctions for ESI Loss – Preamble Elements (Rule 37(e))

- Rule 37(e) “forecloses reliance on inherent authority or state law to determine when certain measures should be used.”
- Rule 37(e) applies only:
 - **To ESI.** “Because [ESI] often exists in multiple locations, loss from one source may often be harmless when substitute information can be found elsewhere.”
 - **If that ESI should have been preserved.** “Rule 37(e) is based on [a] common-law duty; it does not attempt to create a new duty to preserve. The rule does not apply when [ESI] is lost before a duty to preserve arises.”
 - **If the party failed to take reasonable steps to preserve.** Rule 37(e) “recognizes that ‘reasonable steps’ to preserve suffice; it does not call for perfection. ... A party may act reasonably by choosing a less costly form of information preservation, if it is substantially as effective as more costly forms.” The rule “is inapplicable when the loss of information occurs despite the party’s reasonable steps to preserve.”
- Where ESI that should have been preserved is lost despite a party’s reasonable efforts, “Rule 37(e) directs that the initial focus should be on whether the lost information can be restored or replaced through additional discovery.”

(2015 Advisory Committee Note to FRCP 37.)

Key Takeaways

- Read the full text of the rules and advisory committee notes.
- If a judge seems disengaged from case management, request pre-motion conferences and in-person or telephone status conferences.
- Conduct a detailed proportionality analysis of your client's ESI to facilitate more productive Rule 26(f) conferences and create a concrete record for future motion practice.
- Be prepared to share detailed information about your client's information systems and other information sources.
- Carefully review your own and an adversary's objections to document requests to ensure they comply with revised Rule 34.
- Document decisions and decision-making processes concerning preservation scope and execution.

Relevant Practical Law Resources

- Article, The FRCP Amendments: Small Step or Giant Leap?
- Overview of December 2015 Amendments to the Federal Rules of Civil Procedure
- Practice Note, Practical Tips for Preserving ESI
- Standard Document, Document Responses: RFP Response
- Standard Document, Rule 26(f) Report and Discovery Plan
- Standard Document, Fed. R. Evid. 502(d) Order

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Questions

About the Speakers



Honorable Paul W. Grimm, United States District Judge, District of Maryland

Judge Grimm was confirmed as a district judge in 2012 after 15 years as a federal magistrate judge. He served on the FRCP advisory committee for the past six years, including as chair of its discovery subcommittee.



Craig D. Ball, ESI Special Master and Law Professor

Craig is a trial attorney, certified computer forensic examiner, and e-discovery consultant who frequently serves as a court-appointed ESI special master. He also teaches an e-discovery and digital evidence course at The University of Texas at Austin School of Law.



Robert L. Levy, Counsel - Civil Justice Reform and Law Technology, Exxon Mobil Corporation

Robert is an attorney in the law department of Exxon Mobil Corporation. His duties include representing ExxonMobil on civil justice reform initiatives and advising on law technology, including electronic discovery issues and records management. He serves as president of the Civil Justice Reform Group and co-chair of the eDiscovery and Federal Rules Subcommittee.

About the Speakers



Meagan Crowley-Hsu,
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Meagan Crowley-Hsu joined Practical Law from Reed Smith LLP, where she was a senior associate in the litigation department. Previously she was a litigation associate at Debevoise & Plimpton LLP and clerked for the Honorable Joel A. Pisano in the District of New Jersey.



Ruth A. Braun Marshall,
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Ruth A. Braun Marshall joined Practical Law from the New York office of Winston & Strawn LLP, where she was a litigation associate concentrating on securities litigation and complex commercial litigation. She was previously a litigation associate at the New York office of Bryan Cave LLP.

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