This article was originally published in the Commercial Litigation Advisor *(January 2016)*

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COMMERCIAL LITIGATION ADVISOR

The 2015 Amendments to Rules Pertaining to Discovery in Federal Courts

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Effective December 1, 2015, important amendments to the Federal Rules of Civil Procedure, ostensibly to reduce costs and quicken the pace of litigation, went into effect. This article will explore the impact of those amendments on the discovery process in the federal courts.

A critical change is a modification of the scope of discovery in federal courts. No longer is the inquiry merely as to relevancy. Rather, under the new regime, information is discoverable only if it is (i) "*relevant* to any party's claim or defense," (ii) nonprivileged, and (iii) "*proportional to the needs of the case* considering" a series of factors. They include:

- The importance of the issues at stake.
- The amount in controversy.
- The parties' relevant 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.

Notably, the new rules eliminate certain key language as to the scope of discovery. No longer do the rules provide that "relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Moreover, the provisions that provided for the discovery of the "existence, description, nature, custody, correlation and location of any documents . . . and the identity and location of persons who know of any discoverable matter" is removed. While the advisory committee notes indicate that such matters remain discoverable, it is reasonably believed that the elimination of such language will practically reduce the scope of discovery.

A second change is that the court, in a protective order, can allocate the costs of discovery between the parties. That is, if a party seeks for the production of certain material, the court may direct that it pay the other party the costs of producing that material.

Third, the new rules provide for the possibility of the early exchange — before the preliminary conference — of document requests.

As to responses to requests for the production of documents, the new rules require the answering party to provide specificity in its objections to the requests, rather than the traditional "boilerplate" answers. No longer can a party, for example, state that it is not producing documents because the request is "vague" or "unduly burdensome" — rather, the responding party will have to explain why the specific

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request is vague or unduly burdensome and it will have to affirmatively declare whether documents are, in fact, being withheld.

The amendment creates a new set of rules pertaining to the failure to preserve ESI (electronically stored information). If ESI that should have been preserved in the anticipation of litigation is lost because a party failed to take reasonable steps to preserve it AND it cannot be restored or replaced via additional discovery, upon a finding of prejudice to the other party, a court may order the imposition of measures *no greater than necessary* to cure the prejudice. The curative measures could, for example, include precluding a party from putting on certain evidence, allowing the jury to know about the instruction or even an adverse jury instruction.

If the court additionally finds that a party acted with the intent to deprive the other of the use of the information in the litigation, then the court may (i) presume that the lost information was unfavorable, (ii) instruct the jury that it MAY or MUST presume that the information was unfavorable, or (iii) dismiss the action or enter a default judgment.

This obligation to preserve arises when litigation is reasonably anticipated. "Reasonable steps" to preserve ESI are required, not perfection, and the court must consider the party's resources and sophistication.

A preliminary review of these changes in federal discovery practice leads to the following observations:

- Parties must draft discovery requests with the proportionality limitations in mind and consider the costs associated with responding to the requests. This will require the expenditure of greater time in preparing the discovery requests.
- To be in a position to fully leverage proportionality limitations, parties should consider whether the manner in which they describe, set forth and list their claims and affirmative defenses may expand (or limit) the scope of discovery.
- Responding parties should quickly correct any assertion that the appropriate scope of discovery is that which is "reasonably calculated to lead to the discovery of admissible evidence."
- Simply noting that the amount in controversy is large and the responding party's resources are substantial is not sufficient under the proportionality analysis. Rather, all proportionality factors must be considered.
- Parties must consider where information asymmetry may (or may not) justify certain burdens, relating to the new proportionality factor: "the parties' relative access to relevant information."
- Parties must take into consideration the now-confirmed right of a court to issue cost-shifting orders to allocate the expenses of discovery.
- A responding party must be prepared to discuss specifics about the expenses and burdens that they assert in negotiating the scope of a response.
- Responding parties should weigh the specific burdens and costs associated with specific requests against the information the specific requests is likely to elicit and suggest alternatives or limitations to the requests as propounded. If the same information could be obtained in another form of discovery that would be less burdensome, this should be brought to the attention of the court.
- Significantly greater time will be expended in responding to discovery requests due to the mandates of providing specific responses and the disclosure as to whether documents are actually being withheld in response to objections. A careful upfront review of all of the documents will be required as well as the preparation of detailed explanations as to the grounds for nondisclosure.

Only time will tell if these new rules will render the process more efficient or more expensive to the litigants.

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