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Client Alert

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If you read only this…

- New amendments to the Federal Rules of Civil Procedure became effective December 1, 2015, governing all subsequent civil cases **and** all proceedings currently pending, to the extent such application is "just and practicable."
- Amended Rule 26(b) requires discovery to be *proportional* to the needs of the case, in addition to the threshold questions of relevance and privilege.
- In addition to the power to award sanctions in exceptional cases, amended Rule 37 specifies that courts may impose sanctions if a party's failure to preserve electronically stored information prejudices the requesting party, and also identifies specific, substantive sanctions reserved for instances of intentional conduct.

Amendments to the Federal Rules of Civil Procedure Effective December 1, 2015

In More Detail

On December 1, multiple changes to the Federal Rules of Civil Procedure went into effect. The new changes range in subject matter and impact from the acceleration of dates to the permissible scope of discovery. The amendments are intended to focus and streamline discovery, and to modernize the rules to account for the increasing importance of electronically stored information. The individual amendments are discussed below in the order in which they appear in the rules.

Rule 1. Scope and Purpose: The amendment to Rule 1 emphasizes that it is not just the courts, but also the parties, who are expected to ensure a "just, speedy and inexpensive" resolution in civil litigation. Fed. R. Civ. P. 1. The Committee Notes reflect that the administration of civil justice is more effective when parties are discouraged from using procedural tools to increase cost and delay the proceedings.

Rule 4. Summons: Under the new Rule 4, the time limit for serving a defendant is reduced from 120 days to 90 days after the plaintiff files the complaint. The rule also places upon defendants a duty to avoid unnecessary expense involved in serving a summons, including a requirement that a U.S. defendant who fails to return a signed waiver of service from a U.S. plaintiff pay the costs of service.

Rule 16. Pretrial Conferences; Scheduling; Management: New Rule 16 reduces the time for a court to issue a scheduling order to the earlier of 90 days (formerly 120 days) after any defendant has been served or 60 days (formerly 90 days) after any defendant has appeared. The new rule 16 also expressly identifies case management tools intended to reduce and/or focus early-stage discovery disputes, including: provisions concerning the preservation of electronically stored information; agreements regarding the scope and treatment of discovery concerning the attorney-client privilege and work product protection; and procedures for discovery conferences with the court prior to any motion practice.

Rule 26. Duty to Disclose; General Provisions Governing Discovery: The changes to Rule 26 are extensive. First, amended Rule 26(b)(1) adds the requirement that the scope of discovery must be "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." Fed R. Civ. P. 26(b)(1). The amendment also clarifies and reinforces that "[i]nformation within this scope of discovery need not be admissible to be discoverable." *Id*.

The new Rule 26(c) codifies the court's power to allocate costs associated with discovery. The Committee Notes explain that this power already existed and is employed frequently, but the rules now make it explicit to foreclose parties from disputing the court's authority.

Rule 26(d) is amended to allow parties to propound Rule 34 requests for production as early as 21 days after service of the summons and complaint, even if the Rule 26(f) discovery planning conference has not occurred yet. For the computation of the time to respond, requests served prior to the Rule 26 conference are considered to be served at the time of the first Rule 26(f) conference.

In concert with amended Rule 16(b), the new Rule 26(f) requires a discovery plan to include the parties' views and proposals on the form, discovery, preservation of electronically stored information, and the impact of inadvertent disclosure of privileged and/or work-product protected information.

Rule 30. Depositions by Oral Examination; Rule 31. Depositions by Written Questions; Rule 33. Interrogatories to Parties: The changes to these three rules incorporate the "proportionality" requirement of amended Rule 26. For example, the standards for obtaining depositions when leave of the court is required, for extending the duration of depositions and for propounding more than 25 interrogatories now reflect the multifactor proportionality test under Rule 26(b)(1).

Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes: The amendment to Rule 34(b)(2)(A) brings it in line with the new Rule 26(d)(2): if Rule 34 requests are made before the first Rule 26(f) conference, a party has 30 days after the conference to respond. Additionally, new Rule 34 requires a party objecting to a document request to "state with specificity the grounds for objecting" to the request and "whether any responsive materials are being withheld on the basis of that objection." Fed. R. Civ. P. 34(b)(2)(C).

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions: Amended Rule 37(a) expressly incorporates the right to move to compel production of documents, and not just to compel the right to inspect.

The most significant change to Rule 37 is the new standard for imposing sanctions on a party that fails to preserve electronically stored information. Whereas the prior rule provided for sanctions in "exceptional circumstances," the amended Rule 37(e) specifically authorizes sanctions where one party is prejudiced because "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." Fed. R. Civ. P. 37(e).

The amended rule also addresses the need to impose significant, substantive sanctions in instances of intentional destruction of electronically stored information. According to the Committee Notes, the amended rule is intended to restrict these sanctions to instances of intentional conduct, as opposed to prior cases that imposed substantive sanctions for negligent or grossly negligent conduct. The amended rule recites three specific substantive sanctions: the court may "(a) presume 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." *Id*.

Rule 55. Default; Default Judgment: The amendment to Rule 55 explains that a court may set aside an entry of default when there is good cause, but the higher standard outlined in Rule 60(b) must be met to set aside a final default judgment.

Rule 84. Forms; Appendix of Forms: The amendments to the Federal Rules remove the Appendix of Forms. The Committee Notes explain that many local courts and other sources provide their own forms, obviating the need for a standard form prescribed by the rules. The removal of the Appendix of Forms, however, required an amendment to Rule 4, which previously referred to forms in the Appendix. The new Rule 4 therefore contains two forms that were formerly found in the Appendix.

Importantly for patent cases, the removal of the Appendix of Forms means that patent holders may no longer plead infringement with the bare-bones Form 18. In the 2007 decision in *Bell Atlantic Corp. v. Twombly*, the Supreme Court raised the pleading standard in civil cases to require sufficiently detailed facts to show that a claim for relief is plausible on its face. The Federal Circuit, however, continued to allow patent infringement claims to be pled through Form 18, which requires little more than the names of the parties and the asserted patents. *See K-Tech Telecommunications v. Time Warner*, 714 F.3d 1277 (Fed. Cir. 2013). With the removal of Form 18, courts may hold parties claiming patent infringement to the higher *Twombly* pleading standard, making it more difficult for patent holders to bring claims.

Going Forward

The amendments to the Federal Rules of Civil Procedure are intended to reduce the costs associated with discovery, remove certain areas of prior disputes and address prevalent issues with respect to the scope and treatment of electronically stored information. Both the parties and the courts are encouraged

to craft and execute a customized discovery plan that is appropriate to the needs of the case. The concept of “proportionality,” however, injects a potential uncertainty in application and could give rise to discovery disputes over its interpretation. Amidst this uncertainty, the hope is that parties will consider precisely why sought-after discovery is necessary and important prior to serving overly broad discovery requests.

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