Long-Overdue Reforms Come To The Federal Rules

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While the Federal Rules of Civil Procedure (the Rules) were edited at the end of last year, as the changes (effective as of December 1, 2015) come into focus, there is reason to be optimistic about their impact. Magistrate Judge Jeffrey N. Cole of the Northern District of Illinois summarizes the significance of the amendments as follows:

> Judges and lawyers have long recognized that discovery is 'the bane of modern litigation,' and needed reforms were long overdue. The new Amendments to the Federal Rules of Civil Procedure are a response to the growing dissatisfaction with out-of control discovery abuses. The amended rules now require, among other things, greater cooperation by the parties and their lawyers in the discovery process, earlier involvement by judges in the management of cases, and they prohibit discovery that cannot be justified by the time and effort that would be required if it were allowed. Hopefully, the new rules will be more effective in curtailing the ever rising costs of litigation than their pre-amendment versions. Of course, these rules will only be as effective as the litigants and their lawyers abide by them and as judges enforce them. Only time will tell.

Appreciation of the impact of the main revisions requires an understanding of the interplay between the standard applied to discovery and the growing problem of e-discovery. Prior to the 2015 amendments, discovery was permissible up to the bounds of "matter reasonably likely to lead to relevant information." In other words, litigants were free to ask for production of irrelevant documents if they could rationally contend that relevant information was just on the horizon, and judges frequently erred on the side of requiring production.

For litigants and their clients, this standard led to production of reams of paper, imposing costs both in gathering materials and in reviewing opponents' voluminous production. As unwieldy as the "reasonably likely" standard was, it wasn't until e-discovery came on the scene that costs of discovery really skyrocketed. At first e-discovery meant little more than making copies of the data versions of our documents. However, as we began to better understand electronic storage and as business began to rely exclusively on electronic communications, e-discovery became an out of control beast.

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We save multiple drafts of every important document, and we send copies of each of the various drafts to multiple people who then comment on the different drafts. We send emails to many people. Sometimes those emails are forwarded. Some lead to new conversations that continue to attach the original email and/or document attachments. In the middle of an email chain, we ask each other random, unrelated questions ("BTW, did you hear about Brian's sister?"), and the chain takes a detour. Sometimes the company lawyer is included in the emails, and sometimes he or she is not. Sometimes the important documents are spreadsheets that incorporate other vast amounts of data into a single cell.

What would have been produced long ago as a single document and a cover letter, is now 50 versions of the same document at various stages, 1,000 unique emails, and 10 gigabytes of supporting data. Multiply that scenario times 10,000 for a significant case and you begin to understand the task involved in gathering potentially relevant documents, determining where privilege applies to withhold documents, and sorting through the terabytes of data produced by the other parties.

It is no surprise that a cottage industry grew up to service those involved in e-discovery, and for a price, there is always someone willing to help us gather, search, sort, and manage e-discovery. Yet, when each side was able to demand that the other side produce everything that could possibly lead to something that may be relevant, there was little means available to litigants to keep the costs down.

Thanks to the 2015 amendments, the Rules now incorporate the concept of proportionality. Rule 26 explicitly mitigates the scope of permissible discovery by defining the standard in terms of discovery that is relevant to the claims and defenses and, "proportional to the needs of the case…." The Rules also provide guidance to determine if a given discovery request is proportional to the needs of the case, including: the importance of the issues at stake in the case, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues in dispute, and whether or not the expense of discovery compliance outweighs the likely benefit. Undoubtedly, litigants who upset the call for proportionality will hear about the revision to Rule 26(c)(1) which explicitly grants courts authority to shift the financial burdens of discovery compliance, as warranted.

Loss and destruction of electronically stored information (ESI) is addressed in the Rules as well. Prior to the amendments, the Federal Courts applied different standards on how harshly to punish litigants who lost or destroyed ESI. The threat of severe sanctions caused anxiety among in-house counsel and litigants alike when it came to preservation of materials that might be relevant to future litigation. The Rules now standardize and provide guidance to when and to what degree sanctions should be imposed for lost or destroyed ESI. Rule 37(e) now provides:

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 the 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.

Thus, a variety of sanctions remain available to remedy lost or destroyed ESI, but the most severe sanctions will only be imposed if a party failed to take reasonable steps to preserve relevant discovery, the information cannot be restored or replaced, and either the other party suffers incurable prejudice or the ESI was deliberately lost or destroyed. Hopefully, by having a better defined standard, in-house counsel can act with greater certainty, and parties can avoid disputes about what is and isn't sanctionable conduct.

A few other revisions are also worthy of note. Rule 16 shortens the time granted to a plaintiff to obtain service of the Complaint to 90 days. Rule 16 also contains provisions that encourage judges to get more involved in early case management so that problems that cause litigation to spiral out of control can be prevented and/or contained, including the use of pre-motion conferences to avoid full-blown motion practice. Finally, the rules now require parties to explicitly state if or when documents are being withheld from production, forcing lawyers to give up the practice of making an objection while some producing documents, leaving the opponent to guess whether not some other documents were held back upon reliance on the objection. This practice was in some ways encouraged by the prior version of the Rules, leading to unnecessary motion practice or at least anxiety over a well-concealed "smoking gun."

Undoubtedly, some aspects of the Rules will not be applied as intended, and parties will argue over the significance of various words and phrases to suit their objectives. However, the 2015 amendments are certainly a step in the right direction, and there is great reason to hope the ever increasing costs of litigation will retreat for now. Finally, although the Rules only directly apply to Federal Courts, many state court rules are modeled after the Federal Rules, and advancements in Federal practice often spur similar initiatives among the State Courts.