Litigation Update: Big Changes Coming to Federal Rules of Civil Procedure in Effort to Curb Costs, Decrease Delays

September 1, 2015

Earlier this year, the U.S. Supreme Court officially promulgated revisions to the Federal Rules of Civil Procedure, as recommended by the Federal Rules Advisory Committee. The rule changes are expected to take effect on Dec. 1, 2015, pending approval by Congress. The changes are designed to speed up and reduce the cost of litigation—particularly as it relates to discovery—and will impact basic rules dealing with the scope of discovery, the production of documents, and the preservation of electronically stored information (ESI). Some of the most important rule changes expected to take effect on Dec. 1 are summarized below:

Rule 26 - Narrowing the scope of discoverable information

Significant changes have been made to the scope of discovery allowed under Rule 26(b)(1), starting with the definition of discoverable information itself. Eliminated entirely is the longstanding rule providing for discovery of any information that appears "reasonably calculated to lead to the discovery of admissible evidence." The Advisory Committee noted that this phrase has been misused and abused to allow for almost limitless discovery. The new rules will provide for discovery on "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." To underline the new emphasis on proportionality, the amended rule identifies six factors that courts should consider in ruling on discovery disputes:

- The importance of the issues at stake;
- 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.

While five of these six factors previously appeared under Rule 26(b)(2)(C) (providing courts with authority to limit the scope of discovery by motion), the move to Rule 26(b)(1) (on the scope of discovery) makes clear that these proportionality factors must be considered in all cases, not just when raised by motion.

Rule 34 - Requiring specific objections to document requests

While the changes to Rule 26 are mainly favorable to the responding party in discovery, the Rule 34 amendments address concerns often expressed by parties making document requests. Notably, the new rule requires that objections to any request for production be stated "with specificity," thus eliminating the common practice of simply objecting to a request in general terms as "overbroad" or "unduly burdensome," etc. The Advisory Committee Notes appended to the new rule indicate that so long as some part of the request is appropriate, it is now incumbent on the responding party to state what scope would, in its view, be reasonable.

Likewise, changes to Rule 34(b)(2)(C) now provide that when an objection is made to a Rule 34 request, the responding party must indicate whether any documents are being withheld on the basis of the objection. According to the Committee, the goal of this change is to eliminate the confusion that arises when the responding party states one or more objections to a production request and still produces information, without indicating whether information (if any) was withheld on the basis of the stated objection(s).

Rule 37 - Clarifying rules on ESI preservation and spoliation sanctions

While the changes to Rules 26 and 34 are certainly noteworthy, the Advisory Committee saved its most wholesale changes for Rule 37(e), which addresses the preservation of ESI. The Committee acknowledged the present rule is insufficiently clear on when spoliation sanctions may be imposed as a result of a party's failure to preserve, which led to the adoption of very different spoliation standards and sanctions in federal courts across the country, as well as litigants spending an inordinate amount of time and money "on preservation in order to avoid the risk of severe sanctions. . . ."

In contrast to the old rule, which provided no more than a general statement of when sanctions could be imposed, the new rule more clearly explains what sanctions may be imposed and when:

- First, if the court determines that ESI has been lost "because a party failed to take reasonable steps to preserve it," the court may order "measures no greater than necessary to cure the prejudice." The new rules make clear that a court may enter a curative order only if it finds that the failure to reasonably preserve caused prejudice to the requesting party.
- Second, if the court finds that the producing party "acted with the intent to deprive another party of the information's use in the litigation," it may:
  - Presume that the lost information was unfavorable to the party;

- Instruct the jury that it may or must presume the information was unfavorable to the party; or
- Dismiss the action or enter a default judgment.

By specifically outlining the discretionary sanctions that may be imposed in different spoliation situations, the Advisory Committee stated that it intended to promote uniformity among the circuits in the imposition of sanctions. Perhaps most importantly, the new rule allows for an adverse inference instruction only if the spoliation was intentional—negligence or even gross negligence is not enough.

While the new rules hold promise for eliminating some of the costly uncertainty that has plagued efforts to craft reliable ESI retention policies, it will take many months, if not years, to see how courts begin to apply the new rules in practice. In the meantime, businesses would be wise to carefully reexamine their retention procedures in light of the new standards. Close attention to the letter of the rule and the committee's notes may well be the key to not only minimizing ESI expenses, but avoiding costly sanctions down the road.