



# Changes to Federal Rules of Civil Procedure Affecting Patent Litigation

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On December 1, 2015, various amendments to the Federal Rules of Civil Procedure ("Federal Rules") went into effect. Several rule changes are already having a significant effect on litigation in general, and patent litigation in particular.

One of the most notable changes significantly alters the pleading rules in patent infringement cases. Form 18 of the Federal Rules, which the U.S. Court of Appeals for the Federal Circuit had previously relied on in determining the minimum pleading standards for patent infringement complaints, has been eliminated. Form 18 was often utilized by non-practicing entities ("NPEs") to file "bare-bones" patent infringement complaints against multiple defendants in hopes of extracting quick settlements in what is often referred to as "patent troll litigation." With the elimination of Form 18, all patent plaintiffs (including NPEs) must allege more detailed facts supporting their infringement claims. While the level of specificity necessary to survive dismissal is developing, this change likely will force all patent plaintiffs to conduct a more thorough initial investigation and prepare more detailed claim charts prior to filing suit. At a minimum, patent infringement complaints may be required to identify at least one patent claim that is infringed, a specific accused product of the defendant and an explanation in plain terms as to how the product infringes that claim.

The 2015 amendments contain changes designed to encourage parties to develop their cases earlier and likewise encourage courts to be involved earlier in a case. For instance, the deadline for serving a complaint was reduced from 120 days to 90 days. However, there is language making it easier to extend the deadline where the parties are making progress in settlement negotiations. The deadline for the court to issue a scheduling order has been accelerated by 30 days, and parties are now able to serve requests for production of documents prior to the initial discovery and scheduling conference among counsel, a change designed to facilitate a more focused discussion during that conference. Similar to the elimination of Form 18, these changes will require the parties to move quickly at the onset of litigation.

Another significant change of the 2015 amendments is the elimination of the "reasonably calculated to lead to the discovery of admissible evidence" standard governing the scope of discovery, which is replaced by a "proportional" discovery standard. Under the new standard, discovery sought must be proportional to the needs of the case taking into account such factors as



- the importance of the issues at stake;
- the amount at issue;
- the parties' relative access to relevant information;
- the parties' resources;
- the importance of the discovery sought in resolving the issues in the case; and
- whether the burden or expense of the proposed discovery outweighs its likely benefit.

Express recognition of proportionality as part of the scope of discovery may be useful as a tool against NPEs and other parties that seek aggressive discovery of e-mails and other electronically stored information ("ESI") without carefully considering the value of the materials versus the burden of collecting and producing them. This change also increases the importance of getting a sense of the defendant's sales of the accused product and/or market potential early in discovery, as failure to do so may limit the scope of evidence a plaintiff can seek.

Based on a recognition that the threat of sanctions for failure to preserve ESI was resulting in over-preservation of such information and exorbitant discovery costs, there are important changes governing the ramifications of a party's failure to adequately preserve ESI. Under the 2015 amendments, a court may impose measures to rectify the loss only if the ESI "cannot be restored or replaced through additional discovery." Even when there is no adequate replacement discovery, the court may only order sanctions upon a finding of prejudice to another party from the lost ESI, and then only such measures as are necessary to cure the prejudice. However, a court may apply harsher measures where there is an intent to deprive another party of evidence. While the practical effect of these changes remains to be seen, they are designed to reduce the costs attendant to over-preservation of ESI in complex cases like patent infringement actions.

Should you have any questions regarding these changes to the Federal rules, please contact either author of this alert, David Clark or Dave Barnard, at the contact info above.