

Extensive Changes to the Federal Rules of Civil Procedure

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Several significant amendments to the Federal Rules of Civil Procedure took effect Tuesday. They are probably the most wide-ranging set of changes to the rules in more than 20 years. Here are the key changes.

Scope of Discovery

The amended rules now say that discovery is limited to issues that are: (i) "relevant to any party's claim or defense" and (ii) "proportional to the needs of the case." (Rule 26(b)(1)). The familiar language providing that documents and information are discoverable if they are "reasonably calculated to lead to the discovery of admissible evidence" is deleted. The U.S. Court of Appeals for the Eleventh Circuit reaffirmed a broad reading of "reasonably calculated" less than two years ago in *Republic of Ecuador v. Hinchee*, 741 F.3d 1185 (11th Cir. 2013), so this amendment heralds a sea change.

Document Requests

- Service of document requests. Rule 34 document requests may now be served prior to the Rule 26(f) conference. (Rule 26(d)(2)(A)). The intent is to facilitate a more productive conference as the parties will be able to consider the actual document requests while discussing the discovery plan. The time to respond to the request served prior to the conference will run from the date of the 26(f) conference. (Rule 26(d)(2)(B)).
- Specific objections. The response to each item of a Rule 34 request must "state with specificity the grounds for objecting to the request, including the reasons." (Rule 34(b)(2)(B)).
- Specific deadline for production. Production must be completed "no later than the time for inspection specified in the request or another reasonable time specified in the response." (Rule 34(b)(2)(B)).
- Whether production is being withheld. "An objection must state whether any responsive materials are being withheld on the basis of the objection." (Rule 34(b)(2)(C)).

Information Preservation

- No sanctions may issue against a party for spoliation of electronically stored information unless all four of the following criteria are satisfied: (i) the ESI should have been preserved; (ii) it is lost; (iii) the party failed to take reasonable steps to preserve it; and (iv) it cannot be restored or replaced. (Rule 37(e)).
- If all of these criteria are satisfied and the court finds that this has caused actual prejudice, then the court "may order measures no greater than necessary to cure the prejudice." (Rule 37(e)(1)).
- If the spoliator "acted with the intent to deprive another party of the information's use in the litigation"—then, regardless of prejudice, the court may presume the lost information was unfavorable to the spoliator or issue an adverse inference instruction, a default judgment, or dismissal. In this case, prejudice need not be shown, and (ii) intent may be a jury issue.
- Rule 37(e) applies only to spoliation of ESI, not tangible evidence and it applies only to "a party," not third-party spoliators such as subpoena recipients.

Additional Changes

- Rule 4. Time to complete service is reduced from 120 to 90 days. (Rule 4(m)).
- Rule 16. Time for issuance of scheduling order is also reduced from 120 to 90 days after service or 90 to 60 days after appearance. (Rule 16(b)(2)).
- Rule 55. Clarification that heightened standard for relief from judgment only applies to final judgments. (Rule 55(c)).

- Rule 84. The forms are abrogated. However, in approving the rules package the U.S. Supreme Court cautioned that the abrogation of the forms should not be considered substantive.

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