Proposed Amendments to the Federal Rules of Civil Procedure

by Jennifer M. Larson

Proposed amendments to the Federal Rules of Civil Procedure were approved by the Standing Committee on Rules of Practice and Procedure in May 2014, and will be submitted to the Judicial Conference, who will then submit the proposed amendments to the Supreme Court for review. If approved by the Supreme Court, Congress will have seven months to approve or reject the proposed amendments, which would then become effective on December 1, 2015.

Perhaps the most significant change concerns new Rule 26(b)(1) regarding the scope of discovery, which would read as follows:

Rule 26. Duty to Disclose; General Provisions Governing Discovery

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(b) Discovery Scope and Limits.

(1) Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and 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. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Under this proposed new Rule 26(b)(1), gone is the old standard, which allowed for the discovery of any information "reasonably calculated to lead to the discovery of admissible evidence." The new Rule 26(b)(1) would narrow the scope of discovery by requiring that discovery be "proportional to the needs of the case," as measured by the cost-benefit analysis to be performed by weighing six factors: (1) the importance of the issues at stake in the action, (2) the amount in controversy, (3) the parties' relative access to relevant information, (4) the parties' resources, (5) the importance of the discovery in resolving the issues, and (6) whether the burden or expense of the proposed discovery outweighs its likely benefit. The proposed rule appears to place the burden on the requesting party to show that the discovery sought is "proportional."

Another significant proposed change relates to new Rule 37(e) regarding spoliation and sanctions, which would read as follows:

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

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(e) Failure to Preserve Electronically Stored Information. If a party failed to preserve electronically stored information that should have been preserved in the anticipation or conduct of litigation, the court may:

(1) Order measures no greater than necessary to cure the loss of information, including permitting additional discovery; requiring the party to produce information that would otherwise not be reasonably accessible; and ordering the party to pay the reasonable expenses caused by the loss, including attorney's fees.

(2) Upon a finding of prejudice to another party from loss of the information, order measures no greater than necessary to cure the prejudice.

(3) Only upon a finding that the party acted with the intent to deprive another party of the information's use in the litigation:

(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.

(4) In applying Rule 37(e), the court should consider all relevant factors, including:

(A) the extent to which the party was on notice that litigation was likely and that the information would be relevant;

(B) the reasonableness of the party's efforts to preserve the information;

(C) the proportionality of the preservation efforts to any anticipated or ongoing litigation; and

(D) whether, after commencement of the action, the party timely sought the court's guidance on any unresolved disputes about preserving discoverable information.

The proposed new Rule 37(e) would require a court to consider "all relevant factors," including, but not limited to, those listed in new Rule 37(e)(4)(A)-(D), to determine if a situation warrants curative measures, sanctions, or no remedy at all. The new rule would limit sanctions to situations in which the party who cannot produce the electronically stored information "acted with the intent to deprive another party of the information's use in the litigation."

Some other notable proposed amendments include:

- Reducing the time for service of process from 120 days to 90 days. Proposed Rule 4(m).
- Allowing parties to serve requests for the production before the Rule 26(f) conference. Proposed Rule 26(d)(1).
- Requiring a party to make specific objections and to state whether it has withheld any documents. Proposed Rule 34(b)(2)(B)-(C).

Although not yet approved, these proposed rule changes reflect continuing efforts by courts and legislators to address the rising costs and difficulties presented by modern electronic discovery. By merely proposing rule changes like these, the Standing Committee on Rules of Practice and Procedure gives us insight into the concerns of judges and the future direction of the discovery process.

Jennifer M. Larson is an associate at McGuire, Craddock & Strother, P.C. with broad experience representing plaintiffs and defendants in commercial litigation in state and federal venues. Jennifer can be reached at jlarson@mcslaw.com.