10 Discovery Considerations for In-House Counsel Under the Amended Rules

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Since the amended Federal Rules of Civil Procedure took effect on Dec. 1, in-house counsel should keep in mind these 10 discovery considerations as they manage existing lawsuits, plan litigation strategies, and counsel on information governance practices.

1. **Recognize that the 2015 amendments emphasize cooperation and proportionality in more concrete ways than in previous versions**. Unlike previous amendments in 1983, 1993 and 2006 that addressed proportionality, the new amendments emphasize proportionality as a strict requirement in all aspects of discovery. The most fundamental change to the rules is to add a "proportionality" requirement to the scope of what is discoverable under Rule 26(b)(1), and require the court and parties to limit discovery that is not proportional under the circumstances. In addition, Rule 1 has been amended substantively for the first time since 1993 to direct both the "court and the parties" to construe the rules in a manner that will "secure the just, speedy, and inexpensive determination of every action and proceeding." The Committee Notes take the further step and reiterate specifically that "effective advocacy is consistent with – and indeed depends upon – cooperative and proportional use of procedure." You should be prepared to have outside counsel infuse these concepts more prominently into their advocacy in order to satisfy your obligations under the Federal Rules and minimize disproportional cost and burden.

2. **Assess and retrieve the most likely document repositories shortly after issuing the litigation hold notice when discovery is anticipated**. With proportionality and cooperation at the forefront, it will be crucial to marshal information quickly about the volume of anticipated preservation and discovery for initial conferences with opposing counsel and the Court. Being proactive will allow you and your business contacts to develop strategies that will tailor discovery obligations to the updated proportionality criteria set forth in the newly-amended Rule 26(b)(1). The amended rules should favor parties that are prepared to discuss this information early with opposing counsel and the Court.

3. **Conduct thorough witness interviews early**. Consider accelerating the time frame for the interview process so that the potential witnesses and stakeholders are surveyed in conjunction with the issuance of the litigation hold notice. You should also mobilize your IT staff at this early juncture to assess any issues with preservation and collection of electronically stored information (ESI) for inclusion in the Rule 26(f) discovery plan and Rule 16 scheduling order. If a third-party vendor will be needed for preservation or collection, that vendor should be identified at this time as well.

4. **Anticipate earlier and more active judicial case management.** Amendments to Rule 16 have reduced the timing for the issuance of the scheduling order by 30 days, calculated either from the date of service on defendant or after an appearance by defendant. This change, together with the changes to the discovery plan requirements in Rule 26, will likely lead to a more fulsome discussion with the court about the scope of discovery during the initial pre-trial conference under Rule 16(b)(2). One example is that parties may be compelled to present more detailed Rule 26(a)(1) initial disclosures – often parties would minimize the level of disclosure in order to shield certain custodians from discovery or present only general information on document repositories. The local rules and standard practices for many judges already reflect a "hands-on" approach, but be prepared for other judges to become more active in case management.

5. **Expect detailed discussions concerning the review and production methods within the first two to three months of service of the complaint**. As the parameters of the Rule 26(f) conference and Rule 16 scheduling order topics have expanded, your attorneys will need to have a clear sense of the preservation of responsive documents, the likelihood of privileged documents within that pool and the best methods to access and produce those documents. The amended rules also encourage the use of orders under Federal Rule of Evidence 502, which include arrangements whereby the inadvertent disclosure of privileged documents will not lead to waiver of the privilege and will allow the "claw back" of privileged documents. The emphasis on cooperation and proportionality can provide a savvy defendant with the ability to set reasonable limits on the scope of discovery. Plaintiffs will have more tools to motivate recalcitrant defendants under the amended rules and (hopefully) more recourse from the courts.

6. **Take advantage of the ability to serve requests for production before initial discovery discussions with the adversary**. Amended Rule 26(d)(2) permits delivery of Rule 34 requests once 21 days has elapsed after service of the summons and complaint, with the official service date for calculating the time for responses the date of the Rule 26(f) discovery conference. Plaintiffs should consider preparing an initial set of requests alongside the complaint in order to set a foundation for the proof necessary from defendants to establish their claims. Defendants should use the early requests as an opportunity to (1) assess strength of plaintiffs' claims and (2) set the tone for discovery by leading discussions as to the scope of discovery, the use of review technology and the proportionality of the discovery.

7. **Expect more costs relating to the preparation of the Rule 34 responses and objections.** Amendments to Rule 34(b)(2)(B) and (C) now require that a party state "with specificity the grounds for objecting" to discovery requests and also identify whether documents are being withheld on the basis of a stated objection. The changes will likely decrease any use of "boilerplate-type" responses that some parties have been able to use (or abuse) over the years. By requiring identification of withheld documents, counsel will be required to investigate document repositories in far more detail than under the previous practice. Subsection (B) also requires the responding party to complete production of ESI "no later than the time requested for inspection specified in the request or another reasonable time specified in the response." While the section still allows the parties to negotiate timing, this change will likely exert pressure on the parties to shorten the time frames for production.

Many courts have already set default time limits for fact discovery (frequently 120 days). The Rule 34 changes may lead to stricter enforcement of those defaults, more widespread use of default time frames, and a smaller chance that those deadlines will change absent exceptional circumstances.

8. **Consider phasing discovery more actively by prioritizing certain categories of documents or custodians**. Amendments to Rule 26(b)(1) limit discovery to not only what is relevant to any party's claim or defense, but also to what is "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 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 benefit." Of the many ways that proportionality can play out in discovery, consider phasing productions by reducing the number of custodians or categories of documents to be produced in an initial wave of production to sources likely to be most relevant. Courts may be amenable to arguments that parties should assess production from readily accessible sources first, and then evaluate the need and proportionality of less accessible sources in subsequent phases. Note also that since the amendments in Rule 34(b)(2)(B) require production of documents at the time stated in the requests "or another reasonable time stated in the response," phasing production may allow you to comply with short discovery time frames in good faith without herculean efforts to produce all ESI that may ultimately be required.

9. **Remain aware of the risk for sanctions motions under Rule 37(e**). Don't over-preserve due to fear of case-determinative sanctions. The amended Rule 37(e) has clarified that sanctions are only permitted when data subject to preservation has been lost due to the party's conduct. The stated goal of the amendments was to address different spoliation standards among different jurisdictions. Some courts had imposed adverse inference instructions where only ordinary or gross negligence was demonstrated. The amended rule should allow parties to implement sound information governance policies, including the routine destruction of ESI. Motivated parties may still attempt to derail a litigation by focusing on the "case within the case" in order to leverage their position, but the amended rule should reduce the likelihood that a court will tolerate motions without clear evidence; to do otherwise would run contrary of the articulated goal of Rule 1 to provide for the "just, speedy, and inexpensive determination of every action and proceeding."

10. **Consider technology-assisted review (TAR) as an option for productions or document reviews**. While TAR has been used by parties and accepted by courts for the past several years, it has also been described as the "next big thing" in discovery without actually enjoying widespread adoption. Be prepared for litigators experienced with its benefits to recommend usage in an increasing number of lawsuits. When deployed effectively, you can save money on discovery by collecting and processing documents more efficiently (as required by amendments in Rule 26), and reduce the time needed for review and production of documents.

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