

# Recent Amendments to the Federal Rules of Civil Procedure: A New Scope of Discovery?

# 2010 DUKE CONFERENCE

- May 10-11 Duke Law School
- 200 Participants
- Organized to Achieve the Goals of Rule 1: “just, speedy, and inexpensive determination of every action.”
- Conclusion: “What is needed can be described in two words- cooperation and proportionality- and one phrase- sustained, active, hands-on judicial case management.”

# DUKE RULES PACKAGE

- Rule 4(m): Reducing time for service from 120 to 60 days
- Rule 16(b)(2): Scheduling order must issue within 90 days
- Rule 16(b)(1): Encouraging in-person scheduling conf.
- Rule 16(b)(3): Encouraging ESI preservation
- Rule 16(b)(3): Court conf. before moving to compel
- Rule 26(f): Allowing Rule 34 requests right away
- Rule 26(c): Explicit authority for discovery cost-shifting
- Rule 30: Reducing depositions from 10 to 5; 7 to 6 hours
- Rule 31: Reducing interrogatories from 25 to 15
- Rule 34: Objections must state whether documents exist
- Rule 36: Limit on requests to admit to 25

# RULE 26- PROPORTIONALITY

Current:

Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense- including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any mater relevant to the subject matter involved in the action.

# RULE 26- PROPORTIONALITY

New:

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 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 benefits.

## WHAT IS PROPORTIONALITY?

- Judicial Conference: proportionality already exists
- Commentators: sea-change to scope of discovery
- Existing case law relies upon Rule 26(b)(2)(C)(iii):

“To make such a determination, the courts consider what has been dubbed the proportionality test of [Rule 26(b)(2)(C)(iii)]: the needs of the case, the amount in controversy, the resources of the parties, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.”

*American Int’l Specialty Lines Ins. Co. v. NWI-I, Inc.*, 240 F.R.D. 401, 412 (N.D. Ill. 2007).

## Practical Effects of Proportionality- Recent Case Law

- Court can shift costs in whole or in part, limit the number of hours required to search, or restrict sources that must be searched
- Proportionality should be achieved through an iterative approach as the claims and defenses come into sharper focus
- “The discovery rules are not a ticket to an unlimited, never-ending exploration of every conceivable matter that captures an attorney’s interests...where the book is not worth the candle- it ought not be allowed.”
- Practice Guidance: Proportionality should be about where to start rather than where to end. Use standard orders and Rule 16 conferences to frame discovery issues and limit abuses.

# Rule 37(e)

Failure to Preserve  
Electronically Stored  
Information (ESI)

# Examples of Locations of ESI

- Desktop Computers
- Laptops
- Servers
- Removable Media
- Back-up Tapes
- The “Cloud”
- Thumb Drives
- DVDs
- GPSs
- Blackboxes
- PDA/Cell Phone

# Old Rule 37(e)

## **(e) Failure to Provide Electronically Stored Information**

Absent exceptional circumstances, a court may **not** impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the **routine, good faith operation** of an electronic information system.

# New Rule 37(e)

## **(e) Failure to Provide Electronically Stored Information**

If electronically stored information that **should have been preserved in the anticipation or conduct of litigation is lost** because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

- (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
- (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
  - (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.

# Rule 37(e), Part I

(When applicable)

- Only applies to ESI
- Only when duty to preserve
- Only when “lost”

# Rule 37(e), Part II

## (Curative Measures/Sanctions)

- Restore or replace ESI
- If prejudice, order curative measures
- If intent to deprive, impose sanctions

# Practical Problems/Opportunities

- What triggers duty to preserve?
- What is “preservation?”
- What are reasonable efforts to preserve?

# What Triggers Duty to Preserve? (Litigation Holds)

- Common Law Duty
- Statutory
- Court Order (Preservation Orders)
- ESI Retention Policies/Protocols
- Evidence Preservation Letters

# What is “Preservation?”

- Suspend deletion/alteration processes
- Image ESI
- Sequester

# What are Reasonable Efforts to Preserve?

- Perfection is impossible
- May depend on sophistication
- Proportional to dispute
- Seek Court guidance if uncertain

# Rule 4

## Summons

- **Intent:** To reduce delay at the beginning of litigation.
- **Rule 4(m).** Defendant must be served within 90 days after the complaint is filed.
  - ✓ Time limits reduced down from 120 to 90 days.
  - ✓ Does not apply to service in a foreign country or to service of a notice under Rule 71.1(d)(A)

# Rule 16

## Pretrial Conferences; Scheduling

- **Intent:** To speed up the discovery process and permit judges a more efficient means to resolve discovery disputes.
- **Rule 16(b)(2).** The judge must issue the scheduling order as soon as practicable, but **unless the judge finds good cause for delay the judge must issue it** within the earlier of **90** days after any defendant has been served with the complaint or **60** days after any defendant has appeared.
- **Rule 16(b)(3)(B)(v).** The scheduling order may ... **direct that before moving for an order relating to discovery the movant must request a conference with the court.**
  - ✓ Time limits reduced down from 120 and 90 to 90 and 60 days.
  - ✓ Absent “good cause for delay” a judge is required to issue SO
  - ✓ Conferences with a judge can relieve delays and burdens of a more formal motion.

# Rule 26

## Timing and Sequence of Discovery

- **Intent:** To enhance early conferences.
- **Rule 26(d).** Timing and Sequence of Discovery.
  - (2) **Early Rule 34 Requests.**
    - (A) *Time to Deliver.* More than 21 days after the summons and complaint are served on a party, a request under Rule 34 may be delivered:
      - (i) to that party by another party, and
      - (ii) by that party to any plaintiff or to any other party that has been served
    - (B) *When Considered Served.* The request is considered to have been served at the first Rule 26(f) conference.
  - (3) **Sequence.** Unless the parties stipulate or the court orders otherwise for the parties' and witnesses' convenience and in the interest of justice: ...
    - ✓ New provision allows discovery requests prior to the “meet and confer” required by Rule 26(f)
    - ✓ A party can serve another without starting the time limits