

How We Got Here

- From 1938 Civil Rules Enactment to 2010 Duke Conference
- 2013 Amendments Published For Public Comment
- Unprecedented Public Participation
- December 1, 2015: Effective Date

Overview

- Getting the Case Moving Faster
- Case Management
- Party Planning and Communication
- Forms and Abrogating Rule 84
- Cooperation and Rule 1
- Scope of Discovery: The Proportionality Changes
- Sanctions for Failure to Preserve ESI: Rule 37(a)

Getting the Case Moving Faster

- **Rule 4(m)** Period to Serve Shortened From 120 Days to 90 Days
- **Rule 16(b)** Deadline to Issue Scheduling Order Shortened From 120 Days to 90 Days
- Case Gets Moving Two Months Sooner?

Early, Active Case Management

- Committee Note to **Rule 16(b)** Encourages Judges to Hold “Live” Case-Management Conferences
- Preservation and Rule 502(d) Orders Added to List of Issues Court May Address In the **Rule 16(b)** Scheduling Order

Early, Active Case Management

- Advisory Committee Endorses Premotion Conferences for Discovery Disputes
- Added to **Rule 16(b)(3)** List of Issues the Scheduling Order May Address

Party Planning and Communication

- **Rule 26(d)**: Parties May Deliver Document Requests In Advance of **Rule 26(f)** Meeting, but They Are Not Considered Served Until the Meeting
- Preservation and Rule 502(d) Orders Added to the List of Issues the Parties Should Address at the **Rule 26(f)** Meeting

Party Planning and Communication

- Rule 34:** Grounds for Objections Must Be Stated “With Specificity”
- Response Must Identify When Documents Will Be Produced
- Response Must State Whether Documents Are Being Withheld Per Objections

Abrogation of Rule 84

- “Official Forms” Abrogated
- Current Forms 4 and 5 Appended to Rule 4
- Project Underway to Expand AO Forms
- Supreme Court: “Does Not Alter Pleading Standards Under Rule 8”

Cooperation

Rule 1: Scope and Purpose

These rules . . . should be construed, ~~and~~ administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.

Cooperation

Committee Note:

“Effective advocacy is consistent with—and indeed depends upon—cooperative and proportional use of procedure.”

“This amendment does not create a new or independent source of sanctions.”

Scope of Discovery

Rule 26(b)(1): As You Have Known It

1. Relevant, not privileged
2. Claims or defenses, but subject matter upon showing of good cause
3. Including existence and details of documents and people who have discoverable information
4. Need not be admissible to be discoverable
5. Subject to the **limits** of Rule 26(b)(2)(C)

Scope of Discovery

Rule 26(b)(1): As Amended:

1. Relevant, not privileged, **and proportional to the needs of the case**
2. Claims or defenses (no more “subject matter”)
3. Need not be admissible to be discoverable (“reasonably calculated” phrasing deleted)

Scope of Discovery

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.

Scope of Discovery

- No Rigid Formulas
- No Order of Importance
- Case-by-Case Assessment
- Judicial Discretion

Role of Burdens

- No Fixed Burden for Overall Analysis
- No Advanced Showing of Proportionality Required
- No Boilerplate Objections
- Parties Responsible for Supporting Claims of Undue Burden and Claims of Benefit

Focus on Where to Start

- Start by Focusing on Discovery from the Sources That Are:
 - Most Accessible
 - Most Likely to Provide Important Information

- The Results May Be All That is Needed for the Case

- Results Will Provide Information to Resolve What May Be Harder Proportionality Questions

Focus on Where to Start

- Not Necessarily “Phased” Discovery; Can Take Different Forms
- Key Is That the Parties Work With Each Other and, if Needed or Helpful, with the Judge, to Prioritize Discovery
- Can Use The Results of Early Discovery to Decide Whether or What Other Discovery Is Needed
 - Premotion Conferences Can Fairly and Efficiently Resolve Any Discovery Disputes

Tools to Achieve Proportionality in Practice

- Pre-Rule 26(f) orders
- Live Rule 16
- Live Premotion Conferences
- Partial Grants for Sampling of Requested Discovery
- Pattern Discovery Requests
- Targeting Discovery to Dispositive Issues: Planning for Summary Judgment and Other Motions

Cost-Sharing

Rule 26(c): Protective Orders

The court may, for good cause, issue an order to protect a party or person from . . . undue burden or expense, including the following:

specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery

Cost-Sharing

- Default Is Still Producer Pays
- Cost-Sharing Condition Can Alter Burden Analysis
- No Entitlement Just Because Party Is Willing to Pay

Role of Technology

- Affects the Burden Analysis
 - Object Based on Avoidable/Unreasonable Burdens?
- Technology Assisted Review (TAR)
 - Tool for Applying Proportionality
 - Turns Unstructured Piles Into Ordered Stacks
 - Does Not Tell You How Much of the Stack the Humans Need to Review

Failure to Preserve ESI

Rule 37(e): 2006 Provision Deleted and Replaced By a New Rule:

1. Is limited to ESI
2. Does not define “trigger” or “scope”
3. Requires “intent to deprive” for Adverse Inference, Dismissal, or Entry of Judgment
4. Permits any other sanction as needed to cure prejudice

Failure to Preserve ESI

(e) Failure to Preserve 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:

Failure to Preserve ESI

(1) **upon finding prejudice** to another party from loss of the information, **may** order measures no greater than necessary to **cure the prejudice**, or

Failure to Preserve ESI

- (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.
