

PROPORTIONALITY AND THE NEW RULES

Hon. Lee H. Rosenthal & Prof. Steven S. Gensler

I. GETTING THE CASE MOVING FASTER.

- a. **Rule 4(m)** period to serve shortened from 120 to 90 days.
- b. **Rule 16(b)** period to issue case management order shortened from 120 to 90 days.

II. EARLY, ACTIVE CASE MANAGEMENT.

- a. **Rule 16(b)(1)** language changed to encourage “live” conferences.
- b. **Rule 16(b)(3)** amended to add preservation and Rule 502 orders to the topics judges should consider addressing in their case management orders.
- c. **Rule 16(b)(3)** amended to encourage pre-motion conferences for discovery disputes.

III. PARTY PLANNING AND COMMUNICATION.

- a. **Rule 26(d)** amended to allow parties to *deliver* Rule 34 requests before the Rule 26(f) discovery planning conference; conforming changes also made to **Rule 34**.
- b. **Rule 26(f)** amended to add preservation and Rule 502 orders to the topics parties should address at the discovery planning conference.
- c. **Rule 34** amended to require responding parties to:
 - i. state objections “with specificity”;
 - ii. state specifically when materials will be made available; and
 - iii. state clearly if materials are being withheld on the basis of an objection.

IV. DISCOVERY SCOPE, LIMITS, AND PROTECTIONS.

- a. “Proportionality” factors amended and moved from **Rule 26(b)(2)** to **Rule 26(b)(1)**.

- b. “Subject matter” discovery provision deleted from **Rule 26(b)(1)**.
- c. **Rule 26(b)(1)** amended to rephrase relationship between admissibility and discoverability.
- d. Language explicitly stating that scope of **Rule 26(b)(1)** includes discovery regarding the existence and details of sources of relevant information is deleted.
- e. **Rule 26(c)** amended to explicitly reference cost-sharing (“allocation of expenses”) as a permissible protection against undue burden or expense.

V. SANCTIONS FOR FAILURE TO PRESERVE ELECTRONICALLY STORED INFORMATION.

- a. Existing “safe harbor” provision deleted from **Rule 37(e)**.
- b. **Rule 37(e)** rewritten to place limits on spoliation sanctions (but does not address trigger of duty to preserve or the scope of that duty).
- c. **Rule 37(e)** amended to permit “curative measures” upon finding of prejudice.
- d. **Rule 37(e)** amended to permit adverse inference instruction, dismissal, or default only upon a finding that the party who failed to preserve did so “with the intent to deprive another party of the information’s use in the litigation.”

VI. RULE 84 ABROGATED.

- a. Forms 4 and 5 appended to **Rule 4**.
- b. Project underway to expand AO forms.

VII. COOPERATION.

- a. **Rule 1** amended to add “and employed by the court and parties.”
- b. Committee Note endorses cooperation but makes clear no freestanding duty to cooperate is created.