



Faraci Lange

ATTORNEYS

1+ Year Later

The Affect Certain December 1, 2015 FRCP
Changes

Recap of the Amendments

- Cooperation (R. 1)
- Enhanced case management (R. 16)
- Scope of discovery - Proportionality and reasonableness (R. 26)
- Specificity in responding and objecting to RFPs (R. 34)
- Duty to Preserve & Spoliation Sanctions (R. 37)

Rule 26 Changes

- Rule 26(b)(1) – Discovery must be “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 the 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 the likely benefit.”
 - Hundreds of decisions have been issued addressing proportionality
 - Specificity of objections are central to the court’s resolution of disputes
- Rule 26(d)(2) - Discovery can be served 21 days after summons and complaint served and will be considered served at the first R. 26(f) conference.
 - Allows for more fruitful discussion regarding discovery at R. 26(f) conference.

Rule 34 Changes

- Rule 34(b) – Requires parties responding to discovery requests to, among other things, be more specific in objections to RFPs and state whether documents will be withheld pursuant to each objection.

Cases of Interest

Witt v. GC Servs. Ltd. P'ship, 307 F.R.D. 554, 560-561 (D. Colo. 2014)

Before the rule change courts recognized that “counsel should address the proportionality factors during the Rule 26(f) conference.”

Salazar v. McDonald's Corp., 2016 WL 736213 (N.D. Cal. Feb. 25, 2016)

All parties have a shared responsibility to consider the proportionality factors when addressing discovery.

Siriano v. Goodman Mfg. Co., L.P., 2015 U.S. Dist. LEXIS 165040 (S.D. Ohio Dec. 9, 2015)

Court allows extensive discovery after thoughtful consideration of 26(b)(1) factors, but will schedule a case management conference to explore possibility of phasing discovery to make it more manageable

Cases of Interest

Krantz v. State Farm Fire and Casualty Co., 2016 WL 320148 (M.D. La. Jan. 25, 2016)

Court applied proportionality factors in establishing time period and geographic reach of topics for depositions

Kelley v. Apria Healthcare, Inc., 2016 WL 737919 (E.D. Tenn. Feb. 23, 2016)

Proportionality factors favored production of settlement agreement between plaintiffs and settling defendants

Cisco Systems v. Arista Networks, 2016 WL 632000 (N.D. Cal. Feb. 17, 2016)

In analyzing proportionality of plaintiffs' request to take 20 additional depositions, the court analyzed the "particularized need" asserted for each potential deponent

Rule 26 – Cases of Interest

- *In re Bard IVC Filters Products Liability Litigation*, 2016 WL 4943393 (D. Ariz. Sept. 16, 2016)
 - Admonishment the “reasonably calculated” standard no longer applies
 - Burden and expense of searching ESI from 18 foreign entities over a 13-year period outweighs the benefit of the proposed discovery – a mere possibility of finding a foreign communications inconsistent with United States communication.
 - “The court should be sensitive to party resources; aggressive preservation efforts can be extremely costly, and parties (including governmental parties) may have limited staff and resources to devote to those efforts. A party may act reasonably by choosing a less costly form of information preservation, if it is substantially as effective as more costly forms.”

Cases of Interest

- *In re Xarelto (Rivaroxaban) Products Liability*, 2016 WL 311762 (E.D. La. Jan. 26, 2016)
 - Plaintiffs sought to depose defendants' employees and requested production of the employee personnel files on ground personnel files were relevant to employee bias and plaintiffs' theory that the drug Xarelto was "rushed to the market".
 - Noting that personnel files contain personal and potentially embarrassing material, the court concluded that the privacy concerns implicated by releasing personnel files to plaintiffs would be substantial. In contrast, plaintiffs had failed to demonstrate the relevancy and particularity of its requests under both Rule 26 and privacy law.

Rule 37 Changes

- Rule 37(e) – Sanctions for loss of ESI
 - Party moving for sanctions for loss of ESI must show: (1) relevant ESI should have been preserved; (2) it was lost because opposing party failed to take reasonable steps to preserve; and (3) lost ESI cannot be restored or replaced.
 - The court can (1) upon finding of prejudice order measures no greater than necessary to cure prejudice or (2) upon finding that party acted with intent to deprive may impose more severe sanctions enumerated in rule.

ESI Preservation

- Send preservation letter to your client at the earliest opportunity
 - Include types of ESI that should be preserved (e.g. email, texts, social media accounts, digital photos)
 - Examples of types of relevant evidence (e.g. medical records, receipts for co-pays, social media posts related to health, photos showing activity)

ESI Practical Tips – Be Proactive!

- Discuss preservation with your client and make sure he/she understands obligation
- Make sure auto-delete functions are off in email accounts and text applications
- Collect potentially relevant ESI at the earliest opportunity and consider archiving client's Facebook site

Resources

- Duke Law Center for Judicial Studies, Guidelines and Practices for Implementing the 2015 Discovery Amendments to Achieve Proportionality
<http://www.ned.uscourts.gov/internetDocs/cle/2015-09/Guidelines-and-Practices-Sept.19.pdf>
- ABA, New Practice Consideration Under Amendments to Rule 26
https://apps.americanbar.org/litigation/litigationnews/top_stories/041916-rule-26-discovery.html