The New Rules: Making Lawsuits Speedier and Less Expensive

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Be prepared, litigators, amendments to the Federal Rules of Civil Procedure are coming on December 1, 2015. These changes represent the Advisory Committee's attempt to fulfill Rule 1's goal of "just, speedy, and inexpensive" resolution of cases. Judging by the amendments, the Committee felt that civil litigation takes too long and lacks a collaborative *esprit de corps*. Additionally, the new Rules emphasize the importance of "proportionality" in discovery and reflect an adaptation to the increasing prevalence of Electronically Stored Information ("ESI") in civil litigation.

Speed. Certain amendments are intended to speed up litigation by eliminating frequent delays. For example, new Rule 4(m) shortens the time period for serving a defendant from 120 to 90 days. Failure to serve within that time will result in dismissal. Another change shortens the deadline for a court's issuance of Rule 16(b)(2) scheduling orders. Discovery will also start earlier under new Rule 26(d)(2), by allowing Rule 34 Requests for Production to be served just 21 days after service of process. These changes accomplish the Committee's objective of reducing the delays and expenses generally associated with the initiation of litigation and commencement of discovery. Accordingly, attorneys should consider preparing and serving discovery as soon as possible to avoid prolonging the discovery period.

Cooperation. The Committee has also amended Rule 1 to encourage cooperation between the parties. Rule 1 now states that the Federal Rules are to be "construed, administered, *and employed by the court and the parties* to secure the just, speedy, and inexpensive determination of every action and the proceeding." This particular amendment emphasizes that the parties, through counsel and without Court intervention, are obligated to operate under the Rules in a manner that ensures the just, speedy, and inexpensive determination of civil cases. Although the real-world impact of this amendment remains to be seen, the change reflects the Committee's frustration with the lack of cooperation between lawyers - especially during discovery.

Proportionality. To reduce mounting litigation expenses, the Committee has also amended Rule 26(b)(1), which now limits discovery to that which is "*proportional* to the needs of the case." Gone is the all-too-familiar phrase "reasonably calculated to lead to the discovery of admissible evidence." According to the Committee, the amendment simply restores a concept that has been a feature of the Rules since the 1980s. This amended rule stresses the obligation of litigants to consider (i) the importance of the issues at stake in the action, (ii) the amount in controversy, (iii) the parties' relative access to relevant information, (iv) the parties' resources, (v) the importance of the discovery in resolving the issues, and (vi) whether the burden or expense of the proposed discovery outweighs its likely benefit. Some commentators have referred to this particular amendment as a "sea change," but only time will tell whether the reintroduction of proportionality reduces the cost and burden of civil litigation.

ESI. Further amendments to the Rules address the preservation of ESI. New Rule 37(e)(1) affords courts a list of remedies to address parties' failures to preserve ESI that "should have" been maintained. The ESI-related amendments reflect the omnipresence of ESI in civil litigation. Lawyers and clients now, more than ever, must understand ESI-retention policies and programs to protect themselves from the Rule's new array of sanctions.

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