



Best in Class Discovery:
Federal Rules Amendments; Effective 30(b)(6) Depositions;
and Working with Experts

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Agenda

- Takeaways from the 2015 Federal Rules Amendments
- Effective Use (and effective defense of) Rule 30(b)(6) Depositions (“corporate representative” depositions)
- Choosing and Working with Expert Witnesses

Amendments to FRCP

- Amendments effective December 1, 2015
- Changes made to Rules 1, 4, 16, 26, 34, 37 and 84

Hello, “Proportional” and Narrowed Discovery

- Old Rule 26(b) (1) – scope of discovery included “any non-privileged information relevant to any party's claims or defenses”
 - Could be expanded to include information relevant to “the subject matter involved in the action.”
- Amended Rule 26(b)(1)—eliminates “subject matter” proviso and defines scope of discovery as “matter relevant to the parties' claims and defenses *and proportional to the needs of the case*”
- Must consider 6 factors:
 - [i] the issues at stake in action
 - [ii] amount in controversy
 - [iii] parties' relative access to relevant information
 - [iv] parties' resources
 - [v] importance of the discovery in resolving issues, and
 - [vi] whether burden/expense of proposed discovery outweighs its likely benefit

Hello, “Proportional” and Narrowed Discovery

- Takeaway:
 - Discoverability will turn on case-by-case assessment of the information's importance to case
 - Focus on determining what you genuinely need and make a cost-benefit assessment of likely value
 - Consider sequencing discovery to focus on those issues with greatest likelihood to resolve case and biggest bang-for-the buck at the outset, with more discovery, later, as case deserves

Goodbye “Reasonably Calculated”

- Phrase "reasonably calculated to lead to the discovery of admissible evidence" is banished from the lexicon
 - Phrase had become shorthand to justify expansive discovery
 - Rule 26(b) (1) now provides “[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable.”

Active Case Management Encouraged

- Amendments promotes a culture shift toward **more** active case management by judges (with parties' cooperation)
 - Amended Rule 1 provides that the Rules should be "construed" and "administered" to "secure the just, speedy and inexpensive determination of every action and proceeding."
 - Amended Rule 16 encourages live case management conferences and eliminates case management conferences by mail
 - Amended Rule 16 encourages courts to direct parties to request a conference with the court before filing any discovery motion

Early Document Requests

- Amended Rule 26 permits any party to deliver document requests as early as 21 days after service of complaint
 - Although responses not due until 30 days after initial 26(f) conference, early service designed to focus parties on what discovery is proportional and to tee up issues sooner
- Takeaway
 - While Plaintiffs will often have document requests ready to serve at the 21- day point, defendants may need to scramble
 - Even though responding party's time to respond does not begin to run until Rule 26(f) conference, because party had early notice of the materials sought, requests for lengthy extensions will be less tenable

Meaningful Document Request Responses

- Amended Rule 34 requires objections be stated "with specificity."
 - Statement that document production will occur "subject to the foregoing objections" is not sufficient
 - Responses must state "whether any responsive materials are being withheld on the basis of [any particular] objection."
- Production must be completed "no later than the time for inspection specified in the request or another reasonable time specified in the response."
 - And, if the production is rolling, "the beginning and end dates of the production" must be provided
- **Takeaways:** The consequences of failure to meet a promised production end date are unclear
 - One thing is clear—responding parties must accelerate their document collection and review efforts if they are to specify, within 30 days, whether anything is being withheld and what the end date for production will be

Nat'l (and More Forgiving) Standards for E-Discovery Sanctions

- Amended Rule 37 overhauls sanctions for failure to preserve electronic evidence
 - Remedies can be imposed only where information that should have been preserved is lost b/c party failed to take reasonable steps to preserve it, it cannot be restored or replaced through additional discovery, and court finds prejudice to another party
 - Evidentiary sanctions ordered only "upon finding that the party acted with the intent to deprive another party of the information's use in the litigation"
 - In that event (and regardless of prejudice), court may impose a presumption that lost information was unfavorable to party that lost it or may enter judgment against that party
- The amendments do not apply to lost evidence that was not electronically stored (e.g., paper)
- Takeaways: Litigation over failure to preserve should become less attractive (and sanctions rare because required finding is much higher bar than the negligence standard applied by some Circuits)

Corp. Rep. Depositions

- Purpose:
 - Obtain background information
 - Authenticate documents
 - Observe witness demeanor
 - Educate opposing party
 - Learn about criticisms of your client (and admissions of good things)
- Take it early
- Rule 30(b)(6) designee obligated to become knowledgeable of matters beyond those personally known

Corp. Rep. Depositions

- Sequence the examination:
 - Elicit factual and background information and credentials
 - Elicit non-controversial factual information and authenticate documents
 - Elicit positive information about your client (ask about client's strengths and weaknesses, positive performance reviews and documents identifying client's attributes)
 - Move into areas of inquiry where witness will fight (observe witness's demeanor under pressure)

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