United States District Court for the District of New Hampshire

Important Changes to the Federal Rules of Civil Procedure

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SUMMARY OF KEY CIVIL RULES CHANGES

Rule	Change
4	90 Days to complete service Changes to Summons and Waiver forms
16	Shortens time to issue Scheduling Order Unless judge finds good cause
26(b)(1)	Parties may obtain discovery that is Proportional to needs of case, considering - the importance of the issues at stake - amount in controversy - parties' relative access to relevant information - parties' resources - importance of discovery in resolving the issues - whether burden or expense outweighs benefit Information does not have to be admissible to be discoverable <u>Eliminated</u>: Reasonably calculated to lead to the discovery of admissible evidence
26(d)(2)	Requests for Production May serve earlier
34(b)(2)	Must provide greater specificity in objections Must produce documents within reasonable time Confirm whether documents are being withheld on objection
37	Failure to produce documents is sanctionable New standard if ESI is not preserved

Rule 1: The Source for the Solution

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

One problem: Scope of Discovery

- **Relevancy too broad**

- **"Reasonably likely to lead to the discovery of admissible evidence"**

- **Proportionality buried in 26(b)(2)(c)(iii)**

Amending Rule 26: Fixing Scope

- **“obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and <u>proportional to the needs of the case</u>, 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. "**

Impact of Change to Rule 26(b)

- **Proportionality is key**
- **Removes "likely to lead to discovery of admissible evidence"**
- **Forces choices**

Amending Rule 26: Proportionality

- **Court and counsel must confer**

- **Who has the burden?**

- **Senseless motion practice**

Cost Allocation under Rule 26(c)

- **Insert possible cost allocation**

- **Discretionary with court**

- **Could be the next big thing**

Rule 34 Production Amendments

- **Gamesmanship on objections**
- **Are documents withheld?**
- **Tie objections and production to specificity**

Spoliation as a Weapon

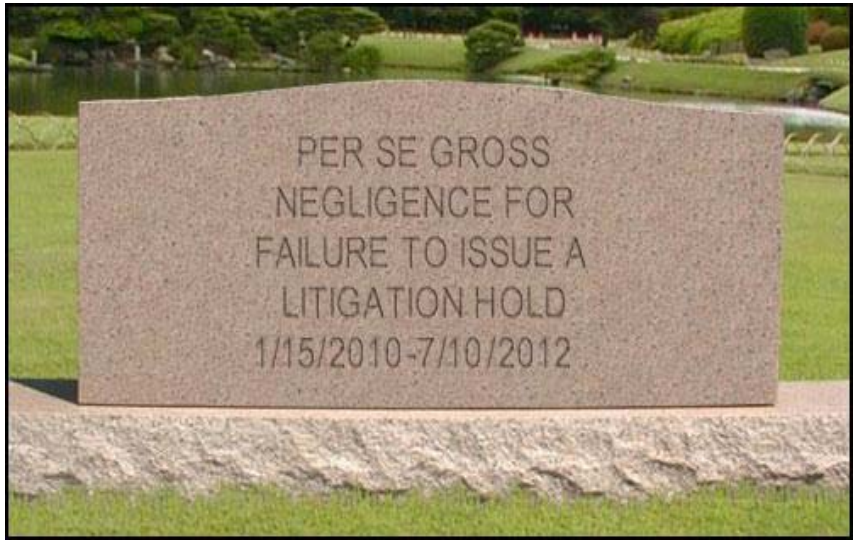
- **The great set up**
- **Try the discovery and the investigation**
- **Seek sanctions**

Problems with Spoliation Standards

- **Trigger?**
- **Negligent v. Intentional**
- **What sanction?**

The Spoliation Dilemma

- **The dreaded "Litigation Hold"**
- **Overholding**
- **Millions being spent**



Revised Language of Rule 37(e)

- (e) **FAILURE TO PRESERVE ELECTRONICALLY STORED NFORMATION**.
- 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 the information, and the information cannot be restored or replaced through additional discovery, the court may:
- (1) Upon a finding of prejudice to another party from loss of the information, order measures no greater than necessary to cure the prejudice;
- (2) Only upon a finding that the party acted with the intent to deprive another party of the information's use in the litigation,
- (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.

Amendment to Rule 37(e)

- National Standard
- Two set process based on prejudice or fault
- "Intent to Deprive"
- Defines the sanctions

Early Case Management Amendments

- **Less time to serve**
- **Faster initial conferences**
- **ESI conferences**

Presumptive Limits Left Unchanged

- **Deposition limits initially to 5**
- **Analysis of cases**
- **Outrage from practitioners**

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