

# A Comprehensive Overview: 2015 Amendments to the Federal Rules of Civil Procedure

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## I. INTRODUCTION

On December 1, 2015, amendments to the Federal Rules of Civil Procedure took effect that will impact the various stages of litigation through discovery. New rules are aimed at curbing excessive discovery—perceived or real—particularly discovery of electronically stored information (ESI). This Article identifies in chronological order how each amendment affects the stages of litigation—from pre-litigation to discovery motions—and explains how each new rule will impact the way attorneys conduct discovery.<sup>1</sup>

The proposed amendments to the federal rules were borne from a May 2010 Conference on Civil Litigation held by the Judicial Conference Committee at Duke Law School.<sup>2</sup> The key takeaways from the Duke Conference were the need for better case management, proportional discovery, and more cooperation among the parties.<sup>3</sup>

In all, Federal Rules of Civil Procedure 1,<sup>4</sup> 4,<sup>5</sup> 16,<sup>6</sup> 26,<sup>7</sup> 30,<sup>8</sup> 31,<sup>9</sup> 33,<sup>10</sup>

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1. For ease of reference, a chart identifying the amended rules affecting the stages of litigation is provided at the conclusion of this Article.

2. After the proposed amendments were published as a package in August 2013, more than 2,300 written comments were received, and more than 120 witnesses appeared to address the Committee in public hearings held in Washington, D.C., Phoenix, and Dallas. COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, *Report to the Judicial Conference*, Rules Appendix B-3 (Sept. 1, 2014).

3. Brian Morris, Note, *The 2015 Proposals to the Federal Rules of Civil Procedure: Preparing for the Future of Discovery*, 41 N. KY. L. REV. 133, 134 (2014).

4. FED. R. CIV. P. 1 (amended Dec. 2015).

5. FED. R. CIV. P. 4(m) (service of process within ninety days) (amended Dec. 2015).

6. Rule 16 is amended as follows: (b)(1)(B) (live scheduling conferences); (b)(2) (90/60 day

34,<sup>11</sup> 37,<sup>12</sup> 55,<sup>13</sup> 84,<sup>14</sup> and the Appendix of Forms<sup>15</sup> are slated for amendment.

Importantly, with the 2015 Amendments, reference to the advisory notes is essential to understanding the new rules. Indeed, advisory notes should be each attorney's first order of business: *the advisory notes are key to understanding the amendments*. Some of the concepts explained in the notes are crucial to understanding how the rules work in practice. Moreover, parties will increasingly cite to the advisory notes in making arguments, and courts will increasingly rely on the advisory notes in making rulings, so familiarity with the language may well prove helpful.

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scheduling order); (b)(3)(B)(iii) (scheduling order may provide for preservation); (b)(3)(B)(iv) (scheduling order may include Rule 502 agreements); and (b)(3)(B)(v) (scheduling order may require pre-discovery motion conference with the court). FED. R. CIV. P. 16(b) (amended Dec. 2015).

7. Rule 26 is amended as follows: (b)(1) (relevant to claim or defense and proportional); (b)(2)(C)(iii) (court may limit discovery outside (b)(1) scope); (c)(1)(B) (allocation of expenses); (d)(2)(A)-(B) (early delivery of document requests); (f)(3)(C) (discovery plan must address preservation); and (f)(3)(D) (discovery plan must address Rule 502 agreements and orders). FED. R. CIV. P. 26 (amended Dec. 2015).

8. Subsections (a)(2) and (d) of Rule 30 are amended to reflect recognition of proportionality by requiring courts to consider Rule 26(b)(1) (in addition to 26(b)(2)) when granting leave to take a deposition by oral examination. FED. R. CIV. P. 30 (amended Dec. 2015). Amended Rule 30 parallels Rule 31 (deposition by written questions) and Rule 33 (interrogatories). FED. R. CIV. P. 30 advisory committee's note to 2015 amendment.

9. Rule 31(a)(2) is amended to reflect recognition of proportionality by requiring courts to consider Rule 26(b)(1) (in addition to 26(b)(2)) when granting leave to take a deposition by written questions. FED. R. CIV. P. 31 (amended Dec. 2015). Amended Rule 31 parallels Rules 30 and 33. FED. R. CIV. P. 31 advisory committee's note to 2015 amendment.

10. Rule 33 is amended to reflect recognition of proportionality by requiring courts to consider Rule 26(b)(1) (in addition to 26(b)(2)) when granting leave to serve interrogatories over the presumptive limit. FED. R. CIV. P. 33 (amended Dec. 2015). Amended Rule 33 parallels Rules 30 and 31. FED. R. CIV. P. 33 advisory committee's note to 2015 amendment.

11. Rule 34 is amended as follows: (b)(2)(A) (early document requests); (b)(2)(B) (specific objections) (state whether producing) (production completed within time specified in the request); (b)(2)(C) (state whether withholding). FED. R. CIV. P. 34 (amended Dec. 2015).

12. Rule 37 is amended as follows: (a)(3)(B)(iv) (adds "fails to produce documents" as basis for motion to compel); (e)(1) (curative measures where no intent to destroy ESI); (e)(2) (specific curative measures only where intent found). FED. R. CIV. P. 37 (amended Dec. 2015).

13. FED. R. CIV. P. 55(c) (amended Dec. 2015) (adding "final" to default judgments that may be set aside under Rule 60(b)). The amendment is intended to make clear that the demanding standard set by Rule 60(b) applies only when seeking relief from a *final* judgment, as distinguished from a default judgment that does not dispose of all of the claims among all parties. FED. R. CIV. P. 55 advisory committee's note to 2015 amendment.

14. Rule 84, which authorized the Appendix of Forms, is abrogated. FED. R. CIV. P. 84 advisory committee's note to 2015 amendment.

15. The Appendix of Forms is abrogated. *Id.*

## II. PRE-COMPLAINT

Even before a lawsuit is filed—and for forever thereafter—courts expect parties to cooperate, and that concept is highlighted in the advisory notes to amended Rule 1. Additionally, the amended rules make clear that parties and attorneys must take pre-litigation steps to preserve relevant and proportional ESI or be subject to curative measures.

### A. *Cooperation: Rule 1*

Even before lawsuits and discovery are contemplated, litigators should be aware of the expectations courts place on the parties to cooperate. Indeed, cooperation has become an increasingly important aspect courts look to in resolving discovery disputes.<sup>16</sup> Judges want parties to get along, or at least be reasonable with each other in resolving discovery disputes, before filing discovery motions. To that end, Rule 1 is amended to require the court **and the parties** (newly added) to construe, administer, and **employ** (newly added) the rules “to secure the just, speedy, and inexpensive determination of every action and proceeding.”<sup>17</sup> Thus, under new Rule 1, the parties share with the court the responsibility to apply the rules in a just, speedy, and inexpensive manner.

Notably, the term “cooperation” does not appear in the rule itself—only in the advisory notes.<sup>18</sup> The advisory notes expressly discuss the notion of cooperation as a **mandated** alternative to the “over-use, misuse, and abuse of procedural tools.”<sup>19</sup> In short, the notes make clear that cooperation is expected among the parties.<sup>20</sup>

The advisory notes explain that amendment of Rule 1 is not intended to create a new or independent source of sanctions—hence the placement of “cooperation” in the notes and not the rule itself. Given the highly subjective nature of the concept of cooperation, this was a wise decision by the drafters. However, relegating the term “cooperation” to the advisory

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16. See generally David J. Waxse, *Cooperation—What Is It and Why Do It?*, 18 RICH. J.L. & TECH. 8 (2012) (explaining that cooperation is essential to ensure “just, speedy, and inexpensive” proceedings); see also The Sedona Conference®, *The Sedona Conference® Cooperation Proclamation*, 10 SEDONA CONF. J. 331 (2009).

17. FED. R. CIV. P. 1 (amended Dec. 2015).

18. Technically speaking, the word “cooperation” does not appear in the advisory notes, either. But the advisory notes use “cooperate” and “cooperative” when discussing the concept of cooperation under Rule 1. FED. R. CIV. P. 1 advisory committee’s note to 2015 amendment.

19. *Id.*

20. The advisory notes remind litigators that “[e]ffective advocacy is consistent with—and indeed depends upon—cooperative and proportional use of procedure.” *Id.* In other words, cooperation does not imply *ineffective* advocacy.

notes should not be viewed as an intent to de-emphasize its importance; to the contrary, explicitly adding a discussion of cooperation in the notes, where none existed before, is significant. Cooperation is here to stay and expected from opposing counsels now more than ever. The prudent attorney should cooperate with opposing counsel at every stage of litigation.

*B. Curative Measures: Rule 37(e)*

Even before a lawsuit is filed, and certainly at the point a lawsuit is filed, preservation obligations may arise.<sup>21</sup> When preservation duties arise, Rule 37(e) comes into play.<sup>22</sup> Specifically, when irreplaceable ESI is lost after a party's duty of preservation is triggered, and the party failed to take reasonable steps to preserve the ESI, courts may impose various curative measures, depending on the level of culpability. Amended Rule 37(e) provides in full:

**Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions**

(e) 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 it, and it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

(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

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21. Unfortunately, it is not always easy to identify when the duty of preservation is triggered. Generally, a legal duty to preserve ESI arises when a party knows, or reasonably should know, of future litigation or an official investigation. *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216–17 (S.D.N.Y. 2003) (*Zubulake IV*). In addition to a client's preservation duties, the trigger of the duty to preserve also triggers the attorney's duty to monitor the client's preservation efforts. *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004) (*Zubulake V*).

22. It may seem counterintuitive to include a discussion of curative measures in the context of the beginning stages of litigation. Understandably—curative measures usually occur later in a lawsuit. However, understating the possible curative measures that can be imposed, and for what conduct, should guide attorneys from the very beginning of the preservation stage.

(C) dismiss the action or enter a default judgment.<sup>23</sup>

One purpose in amending Rule 37(e) is to resolve circuit splits regarding the level of culpability required to impose sanctions for the loss or destruction of ESI.<sup>24</sup> Some circuits held that adverse inference jury instructions (viewed by most as a serious sanction) could be imposed for negligent or grossly negligent loss of ESI,<sup>25</sup> while other circuits required a showing of bad faith.<sup>26</sup>

Notably, “sanctions” does not appear in the amended rule; instead, Rule 37(e) introduces into the rules curative measures courts may utilize if ESI that should have been preserved is lost or destroyed, and specifies the findings necessary to justify the measures.

### 1. Breaking Down Rule 37(e): Five Prima Facie Requirements

Subsection (e) of Rule 37 sets forth the requirements for Rule 37(e) to apply in the first place. The Rule applies when (1) ESI (2) that should have been preserved (3) is lost (4) because a party failed to take reasonable steps at preservation, (5) and the lost ESI cannot be replaced or restored.<sup>27</sup> If these five prima facie requirements are present, Rule 37(e) applies, and curative measures may be imposed.

Conversely, if any one of these five circumstances is not present, Rule 37(e) does not apply at all. So if lost discovery was not stored in an electronic medium; if a party inadvertently lost ESI but took reasonable steps to preserve the ESI; or lost ESI can be restored or replaced, Rule 37(e) does not apply, and courts should take no further measures.<sup>28</sup>

### 2. Unintentional Loss of ESI: Rule 37(e)(1)

Subsection (e)(1) applies when irreplaceable ESI is lost because a party

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23. FED. R. CIV. P. 37(e) (amended Dec. 2015).

24. See FED. R. CIV. P. 37(e) advisory committee’s note to 2015 amendment.

25. See *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 107–08 (2d Cir. 2002) (authorizing adverse-inference instructions on a finding of negligence or gross negligence).

26. See, e.g., *Aramburu v. Boeing Co.*, 112 F.3d 1398, 1407 (10th Cir. 1997) (“The adverse inference must be predicated on the bad faith of the party destroying the records. Mere negligence in losing or destroying records is not enough because it does not support an inference of consciousness of a weak case.”); *Rimkus Consulting Grp., Inc. v. Cammarta*, 688 F. Supp. 2d 598, 614 (S.D. Tex. 2010) (holding that bad faith is required for the imposition of sanctions for spoliation).

27. “Reasonable steps” is not defined by the amended rules, but the advisory notes explain that the rule “does not call for perfection.” FED. R. CIV. P. 37(e) advisory committee’s note to 2015 amendment.

28. *Id.*

failed to take reasonable steps at preservation, but the loss was unintentional. In that circumstance, the court is directed to make a finding as to whether the requesting party suffered prejudice. In determining prejudice, courts should evaluate the importance of the lost information to the litigation.<sup>29</sup>

If the requesting party suffered no prejudice from the loss, a court's inquiry ends.<sup>30</sup> Thus, no prejudice—no curative measures.

However, if a court finds the requesting party suffered prejudice from loss of the ESI, courts are authorized to employ measures “no greater than necessary to cure the prejudice.”<sup>31</sup> The advisory notes provide examples of possible curative measures courts can employ, such as forbidding the party that failed to preserve information from putting on certain evidence, permitting the parties to present evidence and argument to the jury regarding the loss of information, or giving the jury instructions to assist in its evaluation of such evidence or argument.<sup>32</sup>

When the loss of ESI was not motivated by an intent to deprive the other side of that evidence, a court may impose curative measures, which are aimed solely at curing that prejudice.

### 3. Intentional Loss of ESI: Rule 37(e)(2)

When ESI that should have been preserved was lost or destroyed, and the party's intent was to deprive the requesting party of that evidence, Subsection (e)(2) is invoked.<sup>33</sup> Upon a finding that a party acted intentionally, a court may presume for itself or instruct the jury that the electronic information was unfavorable, dismiss the action, or enter default judgment.<sup>34</sup>

Significantly, Subdivision (e)(2) does not require that a court find prejudice to the party who suffered from the loss. When there is intent to deprive a party of ESI, courts can infer prejudice with no further findings of harm required.<sup>35</sup> However, the advisory notes remind courts to exercise

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29. FED. R. CIV. P. 37(e)(1) advisory committee's note to 2015 amendment.

30. FED. R. CIV. P. 37(e)(1) (amended Dec. 2015) (A court may resort to (e)(1) measures only “upon finding prejudice to another party from loss of the information.”).

31. *Id.*

32. FED. R. CIV. P. 37(e)(1) advisory committee's note to 2015 amendment.

33. FED. R. CIV. P. 37(e)(2) (amended Dec. 2015) (“[U]pon finding that the party acted with the intent to deprive . . .”).

34. FED. R. CIV. P. 37(e)(2)(A)–(C) (amended Dec. 2015).

35. FED. R. CIV. P. 37(e)(2) advisory committee's note to 2015 amendment (“This is because the finding of intent required by the subdivision can support not only an inference that the lost information was unfavorable to the party that intentionally destroyed it, but also an inference that the opposing party was prejudiced by the loss of information that would have favored its position.”).

caution in using the measures specified in (e)(2), and that the measures are not required—“[t]he remedy should fit the wrong.”<sup>36</sup>

Accordingly, the court may impose less harsh curative measures, such as those contemplated under (e)(1), and the court need not find prejudice to apply such measures.<sup>37</sup>

**Rule 37(e) Summary.** Under the amendments to Rule 37(e), attorneys must be more diligent than ever when a duty to preserve is triggered. When ESI is involved in a preservation obligation, attorneys should specifically direct the preservation effort by issuing a written hold to ensure that the steps being taken are reasonable. Then, attorneys should closely monitor the client’s preservation efforts to ensure that the steps are in fact being taken.

As long as the client is taking reasonable steps to preserve relevant and proportional evidence, curative measures will never be at issue later in the case. Moreover, attorneys should advise clients of the harsh measures available to courts—including issuing an unfavorable judgment on the merits—should the client be having rogue thoughts about intentionally destroying ESI. Once a court finds intentional destruction of ESI, some form of curative measure or measures are all but guaranteed.

### III. COMPLAINT FILED

#### A. 90 Days to Serve Process: Rule 4(m)

The day a plaintiff files a complaint, the service-of-process clock starts ticking. Amended Rule 4(m) reduces by 30 the number of days a plaintiff has to serve the summons and complaint—from **120** days to **90** days.<sup>38</sup> The advisory notes explain that shortening the time-period is intended to reduce delay at the beginning of litigation.<sup>39</sup>

The advisory committee recognizes that shortening the presumptive time-period for service of process will increase the frequency of occasions for courts to extend the time for service, as service attempts sometimes fail,

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36. *Id.*

37. While the advisory notes state that a finding of prejudice is not necessary to apply (e)(1) or (e)(2) measures where there is intent, it seems that necessarily a court must determine prejudice under both subsections—otherwise, the court will not have information sufficient to order curative measures. *Id.*

38. FED. R. CIV. P. 4(m) (amended Dec. 2015). Amended Rule 4(m) does not impact the timing when a defendant waives service of process pursuant to Rule 4(d).

39. FED. R. CIV. P. 4(m) advisory committee’s note to 2015 amendment.

and some defendants are more difficult to serve.<sup>40</sup> Thus, if a plaintiff's attorney is having difficulties serving a defendant within 90 days of filing the complaint, the motion for additional time to serve process may include reference to the advisory notes, which all but instruct courts to grant such requests.<sup>41</sup>

*B. Abrogation of Forms: Rule 84 and Appendix of Forms*

At various times during the course of a case, attorneys sometimes look to the litigation forms contained in the Appendix of Forms. The Appendix included thirty-six example pleadings, such as proper signature blocks, complaints, answers, judgments, forms for summonses, and requests for waivers of service. Under the new amendments, this Appendix of Forms will be omitted from the federal rules.

To effectuate this change, Rule 84, which authorized the use of the Appendix of Forms,<sup>42</sup> is entirely abrogated. Thus, there will be no Rule 84, and no Appendix of Forms.

The advisory notes state that the forms are no longer necessary and that many of the forms are out of date.<sup>43</sup> For instance, the sample complaints contained in the Appendix embraced far fewer causes of action than now exist in federal court, and the language reflected a simplicity of pleading that has not been used in many years. Moreover, amending the civil forms would have been too cumbersome,<sup>44</sup> and the forms themselves are reportedly rarely used. The advisory notes now include a general list of several sources from which example litigation forms may be obtained, such as the websites of district courts and local libraries.<sup>45</sup>

However, the amendments do not abrogate all of the forms. Rather, the two exceptions are Form 5, which is a request to waive service of process, and Form 6, which is a waiver of service of process. The advisory committee determined that Forms 5 and 6 should be preserved by amending

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40. *Id.*

41. "Shortening the presumptive time for service will increase the frequency of occasions to extend the time for good cause." *Id.*

42. Rule 84 provided: "The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate." FED. R. CIV. P. 84 (prior to Dec. 2015 amendment).

43. FED. R. CIV. P. 84 advisory committee's note to 2015 amendment.

44. Amending the forms contained in the Appendix would have required the same process as amending the civil rules themselves—amendments proposed by the Civil Rules Committee must be approved by the Standing Committee, the Judicial Conference, the Supreme Court, and Congress. Public notice and comment are also required.

45. FED. R. CIV. P. 84 advisory committee's note to 2015 amendment.

Rule 4(d)(1)(D) to attach them to that rule. Thus, a form *Notice of a Lawsuit and Request to Waive Service of Summons* and *Waiver of the Service of Summons* are attached to Rule 4,<sup>46</sup> and the Appendix of Forms is eliminated.

#### IV. COMPLAINT SERVED/DEFENDANT APPEARS

Once a complaint is served on a defendant, or a defendant appears in the action, several important events are triggered. Several of these dates are impacted by the amended rules.

##### A. *Scheduling Order Within 90/60 Days: Rule 16(b)(2)*

Within a few days after service of process on a defendant, or a defendant first appears, the court usually will issue an initial scheduling order.<sup>47</sup> The initial scheduling order sets forth a series of dates, including the all-important date of the Rule 16 scheduling conference, which must occur before the court can issue a Rule 16(b)(1) scheduling order.

Amended Rule 16(b)(2) provides that a judge “*must* issue [a scheduling order] within the earlier of **90** days after any defendant has been served with the complaint or **60** days after any defendant has appeared.”<sup>48</sup> The amendment reduces by thirty days the time the court has to issue the scheduling order—from 120/90 to 90/60. The change is designed to encourage judges to engage in earlier case management.

For litigators, this amendment will result in an even more expedited schedule to prepare for the 26(f) conference, which must take place before the Rule 16(b) scheduling conference, which must take place before the court can issue a Rule 16(b) scheduling order. That is much to do in 90/60 days.<sup>49</sup>

##### B. *Early Rule 34 Document Requests: Rules 26(d)(2) and 34(b)(2)(A)*

Under the new rules, parties will be permitted to deliver Rule 34

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46. A plaintiff may notify a defendant that an action has been commenced and request that the defendant waive service of a summons by “inform[ing] the defendant, *using the form appended to this Rule 4*, of the consequences of waiving and not waiving service.” FED. R. CIV. P. 4(d)(1)(D) (amended Dec. 2015) (emphasis added).

47. In practice, magistrate judges issue initial scheduling orders if authorized by local rule. FED. R. CIV. P. 16(b)(1)(A)–(B); *see also* D. KAN. R. 72.1.2(b).

48. FED. R. CIV. P. 16(b)(2) (amended Dec. 2015) (emphasis added).

49. Amii N. Castle, *Preparing for Your Rule 26(f) Conference When ESI is Involved—And Isn’t ESI Always Involved?*, 62-DEC FED. LAW. 44, 45–49 (Dec. 2015).

document requests 21 days after service of the summons and complaint.<sup>50</sup> Thus, under the new rule, document requests may be delivered to a party before the attorneys have had an opportunity to meet and confer about discovery and before any responsive pleading has been served. This changes from the former rules, which required the parties to meet and confer before serving document requests.

These early document requests are intended to facilitate focused discussion at the Rule 26(f) conference.<sup>51</sup> However, not everyone agrees that permitting early document requests will actually further the goals the amendments are intended to achieve.<sup>52</sup> Some have expressed concern that “any benefit from early discussions will be outweighed by [the] lack of focus in premature [] . . . requests,” resulting in requests that are “less tailored and more burdensome.”<sup>53</sup> In any event, practitioners should carefully consider on a case-by-case basis whether the benefits of serving early document requests outweigh the potential pitfalls.<sup>54</sup> Indeed, not every case is a worthy candidate for early document requests.

Additionally, note the term “deliver,” as delivery will not be counted as “service;” rather, early Rule 34 requests will be considered *served* at the first Rule 26(f) conference,<sup>55</sup> and responses will be due 30 days after that conference.<sup>56</sup> Also note the phrase “*first* Rule 26(f) conference.”<sup>57</sup> In some cases, particularly in cases involving complex issues or multiple parties, the advisory notes contemplate the parties holding more than one Rule 26(f) conference.<sup>58</sup>

Thus, under new Rules 26(d)(2) and 34(b)(2)(A), parties can now deliver document requests before the parties first meet and confer.

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50. FED. R. CIV. P. 26(d)(2) (amended Dec. 2015); FED. R. CIV. P. 34(b)(2)(A) (amended Dec. 2015).

51. FED. R. CIV. P. 26(d)(2) advisory committee’s note to 2015 amendment.

52. See Amii N. Castle, *Avoid Being the Early Worm: Early Service of Rule 34 Document Requests Under the Proposed Amended Federal Rules of Civil Procedure*, 71 J. MO. B. 200, 202 nn.24–28 (2015) (noting the opinion of Honorable Sidney I. Schenkier, a magistrate judge for the United States District Court for the Northern District of Illinois, that early document requests may “aggravate, rather than reduce, the adversarial nature and expense of discovery”).

53. *Id.* at 202 nn.29–37 (noting concerns of Stuart F. Delery, assistant attorney general for the United States Department of Justice, that the early document request procedures will hinder the discovery process) (internal quotations omitted).

54. *Id.* at 202–04 (providing a more detailed discussion on the factors to consider in determining whether to deliver early document requests).

55. FED. R. CIV. P. 26(d)(2)(B) (amended Dec. 2015) (emphasis added).

56. FED. R. CIV. P. 34(b)(2)(A) (amended Dec. 2015).

57. *Id.* (emphasis added).

58. FED. R. CIV. P. 16 advisory committee’s note to 2015 amendment.

## V. THE DISCOVERY PLAN

Rule 26(f)(2) governs the topics attorneys must discuss at the Rule 26(f) conference. The amended rules add two topics that must be addressed in the discovery plan.

### A. *Required Contents in Discovery Plan*

Rule 26(f)(2) provides that, at the meet and confer conference, the attorneys must discuss the nature and basis of their claims and defenses, settlement possibilities, the timing of the parties' Rule 26(a)(1) automatic disclosures,<sup>59</sup> and the preservation of discoverable information. The discussions must also include developing a discovery plan.<sup>60</sup> The required contents of a discovery plan are set forth in Rule 26(f)(3)(A)–(F), with revisions only to subsections (C) and (D).

The following section discusses what has *not* changed under the new amendments regarding the contents of a discovery plan.

**Automatic Disclosures.** First, under Rule 26(f)(3)(A), the first subject to include in the discovery plan is the timing of automatic disclosures under Rule 26(a).<sup>61</sup> For example, if the attorneys decide to extend the presumptive 14-day requirement,<sup>62</sup> that should be a subject included in the discovery plan.

**Discovery Scope.** The next subject to negotiate with opposing counsel and include in the discovery plan is the scope of discovery.<sup>63</sup> Counsel should be ready to discuss what relevant information exists, the key document custodians who created or control the relevant information, and how far back in time that relevant information goes. Also, the discovery plan should address when discovery will be completed (four to six months is typical in a federal case). Thus, issues such as the form or forms of

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59. Rule 26(a) requires the following initial disclosures be automatically made to the other side: (i) known witnesses, (ii) a description of the categories of documents and data known at the time to be relevant, (iii) a computation of any claimed damages, and (iv) disclosure of insurance agreements that may provide coverage for the dispute. FED. R. CIV. P. 26(a)(1)(A)(i)–(iv).

60. FED. R. CIV. P. 26(f)(2) (“[T]he parties must . . . develop a proposed discovery plan.”).

61. FED. R. CIV. P. 26(f)(3)(A) (amended Dec. 2015) (A discovery plan must state “what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made . . .”).

62. FED. R. CIV. P. 26(a)(1)(C) (amended Dec. 2015) (“A party must make the initial disclosures at or within 14 days after the parties’ Rule 26(f) conference . . .”).

63. FED. R. CIV. P. 26(f)(3)(B) (amended Dec. 2015) (A discovery plan must state “the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues . . .”).

production,<sup>64</sup> what potential search protocols (if applicable) may look like, and whether relevant—but inaccessible—ESI exists, are all subjects that should be included in the discovery plan.

**Presumptive Limits.** Another required topic to be addressed in the discovery plan is whether the parties propose changes to the discovery limits already imposed by federal or local rule.<sup>65</sup> For instance, attorneys may agree with opposing counsel that each side will need to serve more than 25 interrogatories, which is the presumptive limit under the federal rules.<sup>66</sup> Whatever the attorneys decide, proposals to alter the presumptive limits should be included in the discovery plan.

**Other Orders.** The discovery plan also should address “any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).”<sup>67</sup> This means that if the parties contemplate the need for a protective order<sup>68</sup> or other orders affecting the scope, timing, and extent of discovery and disclosures, those issues should be addressed in your discovery plan.

The following section discusses what *has* changed under the new amendments regarding the contents of a discovery plan.

#### *B. Preservation: Rule 26(f)(3)(C)*

Rule 26(f)(3)(C) always required that disclosure and discovery of electronically stored information be addressed in the discovery plan. The amendments add preservation to that list: a discovery plan must state the parties’ views and proposals on the disclosure, discovery, or **preservation**<sup>69</sup> of electronically stored information.<sup>70</sup> Attorneys should have substantive

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64. Forms include paper, image files, image files accompanied by load files, native format, and near native format. Amii N. Castle, *Requesting and Producing ESI Under the Amended Federal Rules: Which Form Is Right For You?*, 39 AM. J. TRIAL ADVOCACY 51, 53 (2015).

65. FED. R. CIV. P. 26(f)(3)(E) (amended Dec. 2015) (A discovery plan must state “what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed . . .”).

66. FED. R. CIV. P. 33(a)(1) (“[A] party may serve on any other party no more than 25 written interrogatories, including all discrete subparts.”).

67. FED. R. CIV. P. 26(f)(3)(F) (amended Dec. 2015).

68. FED. R. CIV. P. 26(c)(1) (“A party or any person from whom discovery is sought may move for a protective order . . .”).

69. FED. R. CIV. P. 26(f)(3)(C) (amended Dec. 2015) (A discovery plan must state “any issues about disclosure, discovery, **or preservation** of electronically stored information, including the form or forms in which it should be produced . . .”) (emphasis added).

70. Rule 26(f)(3)(C) states that the discovery plan **must** state the parties’ views and proposals on “any issues about disclosure, discovery, **or** preservation[.]” *Id.* (emphasis added). Framing the issues in the disjunctive by using “or,” the rule requires parties to state their views and proposals on disclosure, or discovery, or preservation—but not all three. Thus, Rule 26(f)(3)(C) does not technically require the parties address preservation in the discovery plan any more than before, since the parties can address only one of the three identified categories (disclosure, discovery, or

discussions at the outset of a case about the factual and legal issues actually in dispute, the potentially relevant ESI, and what it would take to preserve that ESI. Attorneys may address in the discovery plan the steps each party is currently taking, and the steps each party plans to take, to preserve relevant and proportional evidence.

The best practice is to try to obtain an agreement with the other side about the scope of the parties' mutual (but not necessarily identical) preservation obligations. If relevant ESI is unintentionally lost while following an agreed-upon preservation protocol, an opposing party will be hard-pressed to seek curative measures later under Rule 37(e). The prudent attorney should address in the Rule 26(f) conferences what ESI is truly and actually discoverable and try to get an agreement with opposing counsel about the scope of preservation.

*C. Rule 502 Agreements: Rule 26(f)(3)(D)*

Rule 26(f)(3)(D) is amended to explicitly reference agreements and orders under Federal Rule of Evidence 502. Rule 26(f)(3)(D) always required that the discovery plan include any proposals on how the parties will deal with privileged documents. But now the Rule states that the parties must state their views and proposals on privilege agreements and “whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502[.]”<sup>71</sup>

Privilege issues are especially important with some ESI forms. For example, it is difficult and sometimes impossible to bates-stamp, redact, mark, or label each individual document in a native production. So parties often enter into clawback<sup>72</sup> or quick-peek<sup>73</sup> agreements.

The amendment reflects that privilege agreements are becoming commonplace and serves as a reminder to parties they may (and in most cases should) ask a court to enter an order memorializing agreements the parties have made with regard to the inadvertent production of privileged

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preservation), and satisfy the rule.

71. FED. R. CIV. P. 26(f)(3)(D) (amended Dec. 2015) (A discovery plan must state “any issues about claims of privilege or of protection as trial-preparation materials, including—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502 . . .”).

72. Clawback agreements typically provide that inadvertently-produced, privileged data shall be returned upon notification to the receiving party, and that any inadvertent productions shall not amount to a waiver of the attorney-client privilege.

73. Quick-peek agreements typically provide for the return of privileged information contained in a document production. Quick-peek agreements differ from clawback agreements, in that quick-peeks are used when the responding party undergoes no document-by-document review prior to production.

documents and data.

## VI. SCHEDULING CONFERENCE AND SCHEDULING ORDER

After counsel exchange proposed planning reports, the drafts are reduced to one joint<sup>74</sup> proposed planning report and submitted to chambers.<sup>75</sup> Many judges use the parties' jointly submitted report to guide discussions in the scheduling conference, so usually the more detailed planning report the better.

### A. *Live Scheduling Conferences: Rule 16(b)(1)(B)*

Under the new rules, the provision for holding a scheduling conference by “telephone, mail, or other means” is deleted.<sup>76</sup> As made clear in the advisory notes, the intent of omitting this language is to encourage judges to hold live scheduling conferences—either in person, by telephone, or by more sophisticated electronic means.<sup>77</sup>

As a consequence of the amendment and the unequivocal language contained in the advisory notes, judges in districts that do not already hold live scheduling conferences as a matter of court practice may now find themselves ordering live conferences more frequently. As a result, attorneys should expect to appear at the Rule 16(b) scheduling conference—either by phone, video, or at the courthouse.

### B. *Preservation Orders Permitted: Rule 16(b)(3)(B)(iii)*

Rule 16(b)(3)(B) governs the subjects a judge may include in the scheduling order. The amendment to Rule 16(b)(3)(B)(iii) includes adding “preservation” to the list.<sup>78</sup> While courts traditionally have enjoyed authority to issue preservation orders, the rule makes explicit that scheduling

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74. Using the term “joint” is not meant to imply that the parties jointly agree on every provision contained in the proposed planning report. Rather, the joint proposed planning report should indicate where agreements both have, and have not, been reached. When disagreements are identified in the joint planning report, the court can come to the conference better prepared to make discovery and other pretrial rulings from the bench.

75. The Planning Report must be submitted to chambers “within 14 days after the [Rule 26(f) meet and confer] conference.” FED. R. CIV. P. 26(f)(2).

76. FED. R. CIV. P. 16(b)(1)(B) (amended Dec. 2015).

77. FED. R. CIV. P. 16(b)(1)(B) advisory committee’s note to 2015 amendment.

78. “The scheduling order may . . . provide for disclosure, discovery, or *preservation* of electronically stored information.” FED. R. CIV. P. 16(b)(3)(B)(iii) (amended Dec. 2015) (emphasis added).

orders may provide for the preservation of relevant and proportional ESI.<sup>79</sup>

*C. Rule 502 Orders Permitted: Rule 16(b)(3)(B)(iv)*

Amended Rule 16(b)(3)(B)(iv) now expressly references agreements under Federal Rule of Evidence 502 as subjects that may be included in the scheduling order.<sup>80</sup> Specifically, the amended rule states that the scheduling order may include “agreements reached under Federal Rule of Evidence 502.”<sup>81</sup> As such, and similar to its counterpart (amended Rule 26(f)(3)(D)), Rule 16(b)(3)(B)(iv) expressly authorizes courts to include Rule 502 agreements in scheduling orders.

*D. Pre-Motion Conferences: Rule 16(b)(3)(B)(v)*

An entirely new provision added to the federal rules is Rule 16(b)(3)(B)(v), which states that the scheduling order may “direct that before moving for an order relating to discovery, the movant must request a conference with the court.”<sup>82</sup> As noted in the advisory notes, many judges who hold pre-motion conferences find these conferences an efficient way to resolve discovery disputes without the delay and burdens of formal motions practice; but the decision whether to require such conferences is left to the discretion of the judge in each case.<sup>83</sup>

Attorneys should look to the scheduling order before filing (or drafting) a discovery motion to determine whether a pre-motion conference is required. Given the popularity of this provision among magistrate and district court judges, this provision likely will be included in schedule orders more often than before, so attorneys should be on the look out.

## VII. DISCOVERY

The amendments will impact the discovery phase of litigation in three ways by: changing the scope of discoverable evidence, altering how attorneys respond to Rule 34 document requests, and granting express

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79. Amended Rule 16(b)(3)(B)(iii) is parallel to amended Rule 26(f)(3)(C) (preservation addressed in discovery plan) and amended Rule 37(e) (expressly recognizing that a duty to preserve discoverable information may arise before an action is filed). FED. R. CIV. P. 16(b)(3)(B) advisory committee’s note to 2015 amendment.

80. FED. R. CIV. P. 16(b)(3)(B)(iv) (amended Dec. 2015) (permitted contents of a scheduling order to include “agreements reached under Federal Rule of Evidence 502”).

81. FED. R. CIV. P. 16(b)(3)(B)(iv) (amended Dec. 2015).

82. FED. R. CIV. P. 16(b)(3)(B)(v) (amended Dec. 2015).

83. FED. R. CIV. P. 16(b)(3)(B)(v) advisory committee’s note to 2015 amendment.

authority for cost allocation.

A. *Proportionality: Rule 26(b)(1)*

Perhaps the most talked-about revision to the Federal Rules of Civil Procedure is the inclusion of “proportional” in the definition of the scope of discoverable evidence.<sup>84</sup> Amended Rule 26(b)(1) reads as follows:

Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense ***and 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 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. Information within this scope of discovery need not be admissible in evidence to be discoverable.<sup>85</sup>

The six proportionality factors were prominently placed in 26(b)(1) to make them an explicit component of the scope of discovery, requiring parties and courts to consider and address the factors when pursuing discovery and resolving discovery disputes.

This amendment will affect how attorneys assess evidence before litigation begins. To digress back to the pre-litigation phase, during the preservation analysis, attorneys should consider whether the burdens associated with preserving evidence are proportional to the needs of the case. Indeed, in any given case, there may be some categories of evidence that are relevant and proportional, and therefore should be preserved, and other categories where preservation is not feasible or would otherwise not make sense. If the evidence is not proportional to the needs of the case, the evidence need not be preserved.

To that end, the proportionality factors should be considered even before litigation commences. Moreover, the decisions as to why certain evidence is not proportional—and is therefore not being preserved—should be well documented by applying the listed proportionality factors.

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84. Amii N. Castle, *Ready, Set . . . Proportionality! Preservation of Electronically Stored Information Under the Proposed Amended Federal Rules of Civil Procedure*, 84 J. KAN. B. ASS’N 16, 20 (2015).

85. FED. R. CIV. P. 26(b)(1) (amended Dec. 2015) (emphasis added).

*B. Relevant to Claim or Defense. Period.*

1. Relevance: Important Language Deleted From 26(b)(1)

By deleting three provisions from Rule 26(b)(1), the new rules make clear that information is discoverable only if the matter is relevant to a party's claim or defense.

~~**Relevant to Subject Matter.**~~ First, the amendments to Rule 26(b)(1) delete, “[F]or good cause, [the court may] order discovery of any matter relevant to the subject matter involved in the action.”<sup>86</sup> The advisory notes state that the “language is rarely invoked”<sup>87</sup> and that proportional discovery relevant to a claim or defense suffices, given the attorneys have a proper understanding of what is relevant to a claim or defense.<sup>88</sup>

As a result, counsel should no longer argue or state that discovery is warranted because it is relevant to the subject matter of the litigation, nor should counsel argue or state the converse—that discovery is not warranted because it is not relevant to the subject matter involved in the action. Attorneys should omit “relevant to [] subject matter” from the discovery vernacular altogether.

~~**Reasonably Calculated.**~~ Second, the amendments to Rule 26(b)(1) delete the provision allowing for discovery on matters “reasonably calculated to lead to the discovery of admissible evidence.”<sup>89</sup> The advisory notes explain that the phrase has been incorrectly used by some to define the scope of discovery.<sup>90</sup> Thus, counsel should no longer argue that discovery is, or is not, warranted because discovery is, or is not, reasonably calculated to lead to the discovery of admissible evidence. Like “relevant to [] subject matter” assertions, attorneys should omit “reasonably calculated” from their vocabulary.

~~**Discovery About Discovery.**~~ Third, the amendments to Rule 26(b)(1) delete the provision that parties may obtain discovery regarding “the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter.”<sup>91</sup> At first blush, it may appear that deleting this provision means that discovery about discovery is no longer

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86. FED. R. CIV. P. 26(b)(1) advisory committee's note to 2015 amendment.

87. In practice, the opposite was true for this former litigator. Assertions that discovery may be had because the information was relevant to the subject matter of the litigation were common.

88. FED. R. CIV. P. 26(b)(1) advisory committee's note to 2015 amendment.

89. *Id.*

90. *Id.*

91. *Id.*

permitted. However, the advisory notes instruct otherwise.

The advisory notes explain that discovery of these matters is so deeply entrenched in practice “that it is no longer necessary to clutter the long text of Rule 26 with these examples.”<sup>92</sup> As such, parties may still conduct discovery regarding the existence of discoverable information and the identity and location of persons who may know of discoverable information, notwithstanding that the rule omits this provision.

## VIII. DISCOVERY

The amendments impact discovery in the following ways:

### A. *Rule 34 Requests for Production of Documents (RFPs)*

The new amendments will impact both requesting and responding to Rule 34 document requests.

#### 1. Requesting and Proportionality: Rule 26(b)(1)

Proportionality will affect the way parties seeking discovery formulate RFPs. Attorneys should begin the discovery process by thinking about what discovery is relevant to a claim or defense and whether asking the other side to produce that relevant evidence is an undertaking that is proportional to the overall case. Indeed, Rule 34 expressly requires requests to be “within the scope of Rule 26(b),”<sup>93</sup> meaning that parties may only request discovery that is relevant to a claim or defense and proportional to the needs of the case.<sup>94</sup>

#### 2. Responding and Proportionality: Rule 26(b)(1)

Proportionality considerations also will affect the way parties respond to discovery. Objections based on proportionality—that the evidence sought is not proportional to the needs of the case—will become more frequent. The advisory notes include cautionary language against the use of boilerplate objections when it comes to proportionality: “Nor is the change intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional.”<sup>95</sup>

Thus, boilerplate proportionality objections are prohibited and should

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92. *Id.*

93. FED. R. CIV. P. 34(a).

94. FED. R. CIV. P. 26(b)(1) (amended Dec. 2015).

95. FED. R. CIV. P. 26(b)(1) advisory committee’s note to 2015 amendment.

not be asserted. Instead, attorneys asserting a proportionality objection should address the six proportionality factors with specific factual information, to the extent known, such that the requesting party (and the court if necessary) can make a determination regarding the validity of the objection.

Notably, the six proportionality factors are listed in the conjunctive by using the term “and.” Thus, as written, the rule requires that all six factors be addressed to establish proportionality (or disproportionality). In the context of lodging a proportionality objection, all six factors should be addressed, which will necessarily require the objecting party to gather information from the client about the disputed discovery.

There is a significant exception to the rule that that all six proportionality factors must be addressed, and the exception lies in the advisory notes: “[T]he change does not place on the party *seeking* discovery the burden of addressing *all* proportionality considerations.”<sup>96</sup> In the context of responding to a proportionality objection, likely in the form of a motion to compel, the moving party need not address all six factors. Indeed, clarifying that the party seeking discovery need not address all the factors makes sense, given that party likely has little (if any) information early on about the costs and burdens associated with producing the disputed discovery.

#### *B. Four Changes to Written Responses to RFPs*

Rule 34(b) now includes four new provisions that will impact the way attorneys respond to RFPs: specific objections, a production statement, production time, and a withholding statement.

##### 1. Specific Objections: Rule 34(b)(2)(B)

Amended Rule 34(b)(2)(B) now requires a responding party to “state *with specificity the grounds for objecting* to the request, including the reasons.”<sup>97</sup> This amendment is intended to clear any confusion that the standards applicable to discovery sought via Rule 34 (document requests) and discovery sought via Rule 33 (interrogatories): both rules now include the same mandate that objections be stated with specificity.

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96. *Id.* (emphasis added).

97. FED. R. CIV. P. 34(b)(2)(B) (amended Dec. 2015) (emphasis added).

## 2. Production Statement: Rule 34(b)(2)(B)

Rule 34(b)(2)(B) is amended to include the following provision: “The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection.”<sup>98</sup> This change reflects the common practice of producing copies of documents or electronically stored information rather than simply permitting inspection.<sup>99</sup>

As such, responses to RFPs should now include a production statement—a statement identifying whether documents are being produced. Interestingly, by using the word “may,” Rule 34(b)(2)(B) sets forth the obligation to include a production statement as permissive. However, the advisory notes indicate the obligation is mandatory: “The response to the request *must* state that copies will be produced.”<sup>100</sup> Either way, the best practice is to include in RFP responses a statement as to whether the documents are being produced or whether inspection will be permitted.

## 3. Production Time: Rule 34(b)(2)(B)

Rule 34(b)(2)(B) is amended to include the following provision: “The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.”<sup>101</sup> A common practice for litigators is to provide written responses to RFPs within the presumptive 30-day response time so the objections and responses are timely asserted, but provide no indication in the written response as to when the corresponding documents will actually be produced. The amendment to Rule 34(b)(2)(B) now prohibits this practice.

Under the amendments, responding parties must now either produce the corresponding documents within the time specified in the request—usually the 30-day presumptive time frame—or state a reasonable date for production. Thus, document productions can still occur after written responses are served, but the response must state when the production is to occur. When it is necessary to make a production in stages, as in a rolling production, the response should specify the beginning and end dates of the production.<sup>102</sup>

This change could trip unsuspecting attorneys drafting responses to RFPs: If an attorney intends to produce documents after the 30-day written

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98. *Id.*

99. FED. R. CIV. P. 34(b)(2)(B) advisory committee’s note to 2015 amendment.

100. *Id.* (emphasis added).

101. FED. R. CIV. P. 34(b)(2)(B) (amended Dec. 2015).

102. FED. R. CIV. P. 34(b)(2)(B) advisory committee’s note to 2015 amendment.

response time, but fails to include a statement as to the date of the production, that attorney is technically in violation of the rules.

#### 4. Withholding Statement: Rule 34(b)(2)(C)

Rule 34(b)(2)(C) is amended to include the following provision: “An objection must state whether any responsive materials are being withheld on the basis of that objection.”<sup>103</sup> As explained in the advisory notes, this amendment is intended to “end the confusion that frequently arises when a producing party states several objections and still produces information, leaving the requesting party uncertain whether any relevant and responsive information has been withheld on the basis of the objections.”<sup>104</sup> This amendment does not require parties to provide a log of documents withheld; rather, a description of the search parameters may qualify as a statement that documents are withheld.<sup>105</sup>

The withholding-statement amendment is tied to the new provision in Rule 34(b)(2)(B) that objections be stated with specificity. The advisory notes explain the interplay between the two amendments:

An objection may state that a request is overbroad, but if the objection recognizes that some part of the request is appropriate the objection should state the scope that is not overbroad. Examples would be a statement that the responding party will limit the search to documents or electronically stored information created within a given period of time prior to the events in suit, or to specified sources. When there is such an objection, the statement of what has been withheld can properly identify as matters “withheld” anything beyond the scope of the search specified in the objection.<sup>106</sup>

#### C. Expense Allocation: Rule 26(c)(1)(B)

Courts presume that responding parties pay for the expenses incurred in identifying, collecting, and producing documents in response to a discovery request. In other words, the producer usually pays. However, even before the 2015 amendments, courts had the authority to enter orders shifting the costs (or a portion thereof) to the requesting party. Amended Rule 26(c)(1)(B) leaves no doubt courts enjoy this authority to allocate discovery expenses.

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103. FED. R. CIV. P. 34(b)(2)(C) (amended Dec. 2015).

104. FED. R. CIV. P. 34(b)(2)(C) advisory committee’s note to 2015 amendment.

105. *Id.*

106. FED. R. CIV. P. 34(b)(2)(B) advisory committee’s note to 2015 amendment.

“[A]llocation of expenses” is now expressly identified as a subject that may be included in a protective order<sup>107</sup> to “forestall the temptation some parties may feel to contest this authority.”<sup>108</sup> The advisory notes clarify that “[r]ecognizing [this] authority does not imply that cost-shifting should become a common practice”; rather, courts and parties should continue to assume the producer pays.<sup>109</sup>

Notwithstanding the advisory note’s clarification, the express inclusion of cost allocation as a basis to seek a protective order likely will produce more motions requesting that some or all of the costs of discovery be allocated to the requesting party.

## IX. CONCLUSION

Only time will tell whether the 2015 amendments achieve the goals of efficient case management, more proportional discovery, and a heightened level of cooperation between the parties and opposing counsel. Almost certainly, however, the 2015 amendments will impact each stage of the litigation process—from the parties’ initial preservation obligations, to counsels’ Rule 26(f) conferences, to the parties’ discovery requests under Rule 34. To that end, practitioners are encouraged to refer to the chart accompanying this Article for ease of reference in identifying which amendments will impact which stage of litigation.

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107. FED. R. CIV. P. 26(c)(1)(B) (amended Dec. 2015).

108. FED. R. CIV. P. 26(c)(1)(B) advisory committee’s note to 2015 amendment.

109. *Id.*

