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FRCP 12/1/15 Changes – Key ESI Ones

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FRCP 1



Rule 1. Scope and Purpose

These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed, ~~and~~ administered, **and employed by the court and the parties** to secure the just, speedy, and inexpensive determination of every action and proceeding.

Committee Note

Rule 1 is amended to emphasize that just as the court should construe and administer these rules to secure the just, speedy, and inexpensive determination of every action, so the parties share the responsibility to employ the rules in the same way. . . .

FRCP 4(m)



Rule 4. Summons

* * * * *

(m) Time Limit for Service. If a defendant is not served within ~~120~~ **90** days after the complaint is filed, the court . . . must dismiss the action without prejudice . . .

Committee Note

Subdivision (m). The presumptive time for serving a defendant is reduced from 120 days to 90 days. This change, together with the shortened times for issuing a scheduling order set by amended Rule 16(b)(2), will reduce delay at the beginning of litigation.

FRCP 16(b) *(start)*



Rule 16. Pretrial Conferences; Scheduling; Management

* * * * *

(b) Scheduling.

(1) *Scheduling Order.* the district judge . . . must issue a scheduling order:

(A) after receiving the parties' report under Rule 26(f); or

(B) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference ~~by telephone, mail, or other means.~~

Committee Note

. . . . A scheduling conference is more effective if the court and parties engage in direct simultaneous communication. The conference may be held in person, by telephone, or by more sophisticated electronic means.

Rule 16(b) (c't'd)

(2) Time to Issue. The judge must issue the scheduling order as soon as practicable, but ~~in any event~~ unless the judge finds good cause for delay, the judge must issue it within the earlier of ~~120~~ 90 days after any defendant has been served with the complaint or ~~90~~ 60 days after any defendant has appeared.

Committee Note

. . . . This change, together with the shortened time for making service under Rule 4(m), will reduce delay at the beginning of litigation. . . .

FRCP 16(b) *(c't'd)*



Rule 16(b) (c't'd)

(3) Contents of the Order.

* * * * *

(B) Permitted Contents. The scheduling order may:

* * * * *

- (iii) provide for disclosure, ~~or~~ discovery, **or preservation** of [ESI];
- (iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial preparation material after information is produced, **including agreements reached under Federal Rule of Evidence 502; direct that before moving for an order relating to discovery, the movant must request a conference with the court;**

* * * * *

Rule 26. Duty to Disclose; General Provisions [] Governing Discovery

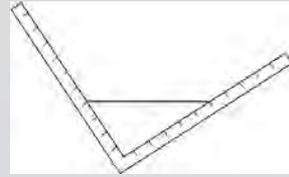
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(b) Discovery Scope and Limits.

(1) Scope in General. Unless otherwise limited by court order, the scope of discovery is 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.

FRCP

26(b) *(c't'd)*



~~— including 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. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action.~~

~~Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).~~

FRCP 26 (part)



Rule 26 (part)

* * * * *

(c) *Protective Orders.*

(1) *In General.* * * * The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: * * *

(B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery; * * *

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FRCP 26 (part)



Rule 26 (part)

* * * * *

(d) Timing and Sequence of Discovery.

(2) Early Rule 34 Requests.

(A) Time to Deliver. More than 21 days after the summons and complaint are served on a party, a request under Rule 34 may be delivered:

(i) to that party by any other party, and

(ii) by that party to any plaintiff or to any other party that has been served

B) When Considered Served. The request is considered to have been served at the first Rule 26(f) conference.

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FRCP

26 (part)



Rule 26 (c't'd)

(f) Conference of the Parties; Planning for Discovery.

(3) *Discovery Plan.* A discovery plan must state the parties' views and proposals on:

* * * * *

- (C) any issues about disclosure, or discovery, **or preservation** of [ESI], including the form or forms in which it should be produced;
- (D) 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;**

* * * * *

FRCP 34



Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things . . .

* * * * *

(b) Procedure.

(2) Responses and Objections.

(A) *Time to respond.* The party to whom the request is directed must respond in writing within 30 days after being served or — if the request was delivered under Rule 26(d)(2) — within 30 days after the parties' first Rule 26(f) conference. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(B) *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state **an objection with specificity the grounds for objecting to the request, including the reasons.**

FRCP 34(b)(2) (c't'd)



Rule 34(b)(2) (c't'd)

(B) (c't'd) The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. 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.

(C) Objections. An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest.

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Committee Note

Several amendments are made in Rule 34, aimed at reducing the potential to impose unreasonable burdens by objections to requests to produce. . . .

FRCP 34(b)(2) *(c't'd)*



Committee Note *(c't'd)*

Rule 34(b)(2)(B) is amended to require that objections to Rule 34 requests be stated with specificity. . . . The specificity of the objection ties to the new provision in Rule 34(b)(2)(C) directing that an objection must state whether any responsive materials are being withheld on the basis of that objection. 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. . . .

FRCP 34(b)(2) *(c't'd)*



Committee Note *(c't'd)*

Rule 34(b)(2)(C) is amended to provide that an objection to a Rule 34 request must state whether anything is being withheld on the basis of the objection. This amendment should 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. The producing party does not need to provide a detailed description or log of all documents withheld, but does need to alert other parties to the fact that documents have been withheld and thereby facilitate an informed discussion of the objection. An objection that states the limits that have controlled the search for responsive and relevant materials qualifies as a statement that the materials have been “withheld.”

FRCP 37(e) *(start)*



- **B. Amended FRCP 37(e):**

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

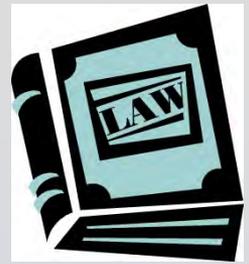
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*(e) ~~Failure to Provide~~ **Preserve**
Electronically Stored Information.*

~~*Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system.*~~

If [ESI] 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:

FRCP 37(e) (c't'd)



(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

(C) dismiss the action or enter a default judgment.

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FRCP

37(e) *(c't'd)*

Committee Note

Subdivision (e). . . . Federal circuits have established significantly different standards for imposing sanctions or curative measures on parties who fail to preserve electronically stored information. These developments have caused litigants to expend excessive effort and money on preservation in order to avoid the risk of severe sanctions if a court finds they did not do enough. New Rule 37(e) replaces the 2006 rule. It authorizes and specifies measures a court may employ if information that should have been preserved is lost, and specifies the findings necessary to justify these measures.

FRCP 37(e) *(c't'd)*

Committee Note *(c't'd)*

Subdivision (e) *(c't'd)* It therefore forecloses reliance on inherent authority or state law to determine when certain measures should be used. . . .

The new rule applies only if the lost information should have been preserved in the anticipation or conduct of litigation and the party failed to take reasonable steps to preserve it. Many court decisions hold that potential litigants have a duty to preserve relevant information when litigation is reasonably foreseeable. Rule 37(e) is based on this common-law duty; it does not attempt to create a new duty to preserve. The rule does not apply when information is lost before a duty to preserve arises. . . .

FRCP 37(e) *(c't'd)*

Committee Note *(c't'd)*

Subdivision (e)(2) This subdivision authorizes courts to use specified and very severe measures to address or deter failures to preserve electronically stored information, but only on finding that the party that lost the information acted with the intent to deprive another party of the information's use in the litigation. is designed to provide a uniform standard in federal court for use of these serious measures when addressing failure to preserve electronically stored information. It rejects cases such as *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002), that authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence.

Conclusion/ Questions



■ Q&A

■ Robert D. Brownstone

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