

How the Amended Federal Rules Will Change Patent Litigation

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Significant amendments to the Federal Rules of Civil Procedure became effective on December 1, 2015 and include an important change to patent infringement pleading practice and the most notable revisions to the civil discovery rules in years. All attorneys, and particularly patent litigators, should become familiar with these amendments, which apply to all cases pending as of December 1.

Pleadings: Goodbye to Bare-Bones Patent Infringement Complaints?

The new amendments abrogate the Appendix of Forms, including Form 18: a bare-bones complaint for patent infringement alleging nothing more than the existence of a patent and infringement of it. That form generated controversy because it seemed in conflict with the “plausibility” pleading requirements required by the Supreme Court in *Twombly* and *Iqbal*. Nonetheless, the Federal Circuit has held that a complaint that was consistent with Form 18 was immunized from attack. Without Form 18, patent infringement complaints will be in the crosshairs of many defendants, who will almost certainly challenge patent infringement complaints, motivated by the prospect of securing dismissal.

Courts will likely expect more detailed allegations of patent infringement. Exactly what will need to be alleged remains to be seen. However, plaintiffs should consider how much detail to provide about their infringement contentions and should monitor what will likely be an evolving standard. At minimum, they should gather enough information before filing suit so that they are prepared to amend to provide more specific contentions if needed. While courts may not ultimately require detailed claim charts at the pleading phase, a plaintiff that relies on the former Form 18 practice risks dismissal for failure to state a claim.

Discovery: Keeping Things Proportional Through Reasonably Calculated Change

The new rules include the most notable changes to federal civil discovery practice since the e-discovery amendments almost a decade ago.

“Proportional” Discovery

Rule 26(b)(1), which defines the scope of discovery, has been revised to specify that discovery is limited to information that “is relevant to any party’s claim or defense *and proportional to the needs of the case*” (amended text in italics). Although concepts akin to proportionality – *i.e.* burden, cumulativeness, and expense – were previously contained within protections available by court order under Rule 26(b)(2), proportionality now defines the scope of discovery itself. This emphasis is reinforced by a change which explicitly authorizes a court to allocate the expenses of discovery.

The amendments also delete the familiar language referencing discovery that is “reasonably calculated to lead to the discovery of admissible evidence.” This phrase was jettisoned because it was too commonly improperly understood to enlarge the scope of discovery beyond information that was relevant.

These changes should provide a signal to courts that a party is no longer entitled to burdensome disproportionate discovery simply by showing relevance or arguing that the information was “reasonably calculated” to lead to admissible evidence. From now on, proportionality will also be part of the vernacular.

Specificity in Responses to Document Requests

What one hand giveth, however, the other taketh away. Parties facing discovery must now state objections to document requests with specificity and identify whether documents have been withheld based on the objections. They must also state when their responsive production will be complete, if that differs from the time specified in the requests.

By requiring this information, the new rules put a premium on a party's early assessment of its information systems. Parties and their counsel should identify early on what potentially relevant materials they may have so they are able to comply with the new rule.

Preservation of ESI

Several amendments give attention to the preservation of electronically stored information ("ESI"). Most notably, Rule 37(e) establishes a uniform, national standard for sanctions for failure to preserve ESI. The rule requires that a party take "reasonable steps" to preserve information once litigation is anticipated, and permits sanctions to cure any prejudice resulting from a failure to take such steps. Certain severe sanctions – dismissal, default judgment, and even adverse presumptions or jury instructions – may only be ordered if the court finds that the spoliation was intentional.

Getting Things Moving: Acceleration of Early Case Deadlines

The new amendments also shorten the deadlines for two key early milestones: service of the complaint and issuance of the court's initial scheduling order. Under the new rules, a plaintiff will have 90 days – rather than 120 – to serve the complaint. The amendments similarly shave 30 days off the time allowed for issuance of a scheduling order.

The latter change is significant because the parties' Rule 26(f) conference and the commencement of fact discovery are tied to that date, effectively also moving up the commencement of discovery as well. These changes will likely accelerate the early phases of the case by as much as one to two months. It remains to be seen whether those time savings will translate to more compressed overall case schedules. However, plaintiffs must be prepared to more quickly serve their complaints. Defendants facing weak claims will be served with – and thus be able to seek dismissal of – the complaint much earlier.

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