



Major Changes Coming to Federal Rules of Civil Procedure

A sweeping set of changes to the Federal Rules of Civil Procedure is scheduled to become effective later this year that could dramatically change current discovery, procedural, and trial practices. The amendments to Rules 1, 4, 16, 26, 30, 31, 33, 34, 37, and 55 of the Federal Rules of Civil Procedure, as well as the abrogation of Rule 84, (collectively referred to as the amendments) represent the culmination of efforts beginning in 2010 to examine the state of civil litigation in federal courts and ensure the rules remained consistent with Rule 1's goal of achieving a "just, speedy, and inexpensive determination of every action." The amendments were recently approved by a judicial committee, are currently under review by the U.S. Supreme Court, and, if approved by Congress, will become effective Dec. 1.

A May 2010 conference on civil litigation at Duke University Law School, attended by 200 participants representing a diverse cross-section of the legal community, ultimately concluded that while the federal civil litigation process was not in need of a top-down reconfiguration, significant changes could be made to facilitate the disposition of civil actions, foster communication and cooperation between parties, and enable more efficient judicial case management. As the Committee on Rules of Practice and Procedure stated in a report to Chief Justice John G. Roberts, "What is needed can be described in two words—cooperation and proportionality—and one phrase—sustained, active, hands-on judicial case management."

Four years after the Duke conference—and with the additional insight of more than 2,300 comments from interested practitioners and academics—the sweeping changes envisioned by the amendments will likely have a profound impact on a large cross-section of practitioners.

Rule 1

The committee sought to amend Rule 1 to include clarifying language that the Federal Rules of Civil Procedure 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. While not creating any new set of sanctions, Rule 1 added specific language that the rules were to be employed by the court and the parties.

Rule 4

Currently, Rule 4(m) requires that the summons and complaint in an action must be served within 120 days. The committee initially proposed to amend Rule 4 by halving this time period from 120 days to 60 days but was eventually persuaded by the

subsequent public feedback to curb the decrease from 120 days to 90 days. Practitioners voiced concerns that compliance with Rule 4(m) could be difficult with defendants who were difficult to locate or serve, and also noted the potential for difficulties should a defendant refuse a waiver of service and force service in the resulting shortened period.

Rule 16

The first significant changes to the Federal Rules of Civil Procedure come in the form of amendments to Rule 16. The first change deals with encouraging direct communications at initial case management conferences by deleting reference to a conference occurring "by telephone, mail, or other means" in Rule 16(b)(1)(B). While Rule 16(b)(1)(A) will continue to allow courts to craft the scheduling order based on the parties' Rule 26(f) report, the amendment will also encourage direct communications where warranted between judges and parties.

The second and third amendments to Rule 16 attempt to speed up the issuance of the scheduling order, as well as expand the list of topics that can be addressed. Rule 16(b)(2) reduces the time for issuance of the scheduling order from 120 days to 90 days after a defendant has been served, or from 90 days to 60 days after any defendant has appeared. Rule 16(b)(3)(B) (iii) and (iv) specify that a court may address the preservation of electronically stored information (ESI), as well as agreements reached under Rule 502 of the Federal Rules of Evidence pertaining to disclosure of attorney-client privilege or work-product protection.

Finally, the last amendment reflects the growing consensus favoring a discovery conference with the court before the filing of any discovery motion. Rule 16(b)(3)(B)(v) was created to specify that a scheduling order may "direct that before moving for an order relating to discovery, the movant must request a conference with the court."

Rule 26

The Committee also recommended significant changes to Rule 26. One of the primary amendments relates to the scope of discovery under Rule 26(b)(1) by replacing the requirement that discovery be "relevant to any party's claims or defense" with a "proportionality" factor that incorporates the factors currently set forth in Rule 26(b)(2)(C): the importance of the issues at stake, the amount in controversy, the parties' relative access to information, the parties' resources, and the importance of the discovery in resolving the issue. Of note, the "amount in contro-

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versy” factor was moved to follow the “importance of the issues at stake” factor to emphasize that the amount in controversy was *not* the most important concern.

The committee also recommended the deletion of the sentence providing that “[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” The committee noted that the scope of discovery was never meant to encapsulate a “reasonably calculated” standard, and instead proposed new language that would reiterate the principle that inadmissibility was not a ground to oppose discovery of relevant information. The committee recommended replacing that sentence with this language: “Information within this scope of discovery need not be admissible in evidence to be discoverable.”

Currently, Rule 26(c)(1) allows the issuance of protective orders to protect a party or person from whom discovery is sought. However, the committee proposed that Rule 26(c)(1) be amended to expressly acknowledge a court’s authority to allocate the expenses of discovery to the requesting party. Given that this authority has been recognized by the Supreme Court for several decades, the committee recommended the amendment of Rule 26(c)(1)(B) to provide that a protective order may specify “the terms, including time and place *or the allocation of expenses*, for the disclosure of discovery” (emphasis added).

Finally, the committee proposed the addition of Rule 26(d)(2) to allow a party to serve a Rule 34 document production request prior to the Rule 26(f) meeting between the parties. While the requesting party is free to serve the Rule 34 request prior to the Rule 26(f) meeting, the date of service would be calculated as the date of the first 26(f) meeting.

Rules 30, 31, and 33

Minor amendments were proposed for Rules 30, 31, and 33, which govern depositions by oral examination, depositions by written questions, and interrogatories, respectively. The parallel amendments were proposed to reflect the newly added proportionality factor in Rule 26(b)(1).

Rule 34

The committee proposed several significant amendments to Rule 34, which governs the production of documents, ESI, and tangible things, or entering onto land for inspection or other purposes. These amendments seek to avoid common issues arising in discovery, including the use of boilerplate objections, whether or not documents are being withheld on the basis of objections, and the timing of production of responsive documents. The first amendment clarifies that any Rule 34 requests served prior to the parties’ first Rule 26(f) conference are due within 30 days after that first 26(f) conference.

The second amendment addresses the use of boilerplate objections by proposing to amend Rule 34(b)(2)(B) to require that objections to Rule 34 document production requests be stated with specificity. Such broad and boilerplate objections have recently become commonplace in discovery disputes. Indeed, the committee note to Rule 34(b)(2)(B) indicates that while an objection may be raised to the broad nature of a request, the objection should state the scope that is not overbroad if a portion of the request is appropriate. Additional language is also

proposed in Rule 34(b)(2)(B) to allow a responding party to state that it will produce copies of documents or ESI in lieu of permitting inspection, and to require that the production must be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.

Finally, the committee addresses the issue of withholding documents based on an asserted objection. Rule 34(b)(2)(C) currently provides that an objection to a request must specify the part and allow inspection of the remainder. The amendment proposes to add language to Rule 34(b)(2)(C) to require that an objection “must state whether any responsive materials are being withheld on the basis of that objection.” In short, the proposed amendments to Rule 34 may have a significant (and encouraging) impact on minimizing discovery disputes.

Rule 37

The committee proposed significant amendments to Rule 37 and sought to rewrite the current rule with respect to preserving electronically stored information. Adopted in 2006, the current form of Rule 37 only cautioned the court against imposing sanctions for properly preserving ESI. Reflecting on the nearly 10 years that have passed since Rule 37’s passage, the committee decided that a detailed revamping of the rule was in order. Driving these concerns were widely held feelings that many individuals and entities went above and beyond the necessary preservation out of fear that anything less could result in a showing of negligence or even an adverse inference in jury instructions. The committee also noted a circuit split among the requisite showing before an adverse inference could be included in jury instructions.

These concerns and accompanying research ultimately yielded a revised Rule 37 that, rather than attempt to delineate the precise circumstances triggering a preservation obligation, sought to provide an array of remedies a court may take when it determines that certain information that should have been preserved is lost. In other words, the amended Rule 37 does *not* create a duty to preserve; rather, the rule yields to the duty imposed by case law that a preservation obligation is created when litigation is reasonably anticipated.

The committee’s amendments essentially replace Rule 37(e)(1) and provide the court with a nonexhaustive list of “curative measures” and “sanctions” in the event that a party “failed to preserve discoverable information that should have been preserved in the anticipation or conduct of litigation.” These “curative” factors include allowing additional discovery and ordering the offending party to pay reasonable expenses caused by the failure. While the court is also permitted to sanction the offending party, Rule 37(e)(1)(B) allows the imposition of limited sanctions provided in Rule 37(b)(2)(A) only where the party’s actions either (1) caused substantial prejudice and were willful or in bad faith, or (2) irreparably deprived a part of a meaningful opportunity to present or defend against the claims made in the litigation.

Rules 55 and 84

The committee proposed to amend Rule 55(c) by clarifying that a court may set aside a *final* default judgment under Rule 60(b). Given the relationship between Rules 54(b), 55(c), and 60(b), the committee felt specifying Rule 60(b)’s heightened standards were applicable only when seeking relief from a final judgment.

follow. Lawyers who maintain this commitment seem to have more success, and a better relationship with the court, than lawyers who fail to honor this obligation.

Stuart: Treat every member on a judge's staff as if he or she is the judge. In other words, show the same respect for the staff as you would for the judge.

Although this is just a small sample of the many law clerks in the United States, familiar themes abound from their responses. These talented lawyers practice in relative obscurity but clearly serve a critical part of the judicial process in federal courts. ☺

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Endnotes

¹As Judge Robert J. McNichols pointed out, “[n]ot so very long ago, law clerks typically held their positions for only a one- or two-year period.” *Bishop*, 806 F. Supp. at 900. However, as the court

continued, welcoming a new law clerk annually, while a “good experience for the law clerk,” was “not particularly helpful to the system” because, “[b]y the time a clerk became sufficiently familiar with the mechanics of the task at hand to be productive, he or she would move on.” *Id.* (citations omitted).

² “[N]ot merely the judge’s errand runners[,]” law clerks “are sounding boards for tentative opinions and legal researchers who seek the authorities that affect decision.” *Hall v. Small Bus. Admin.*, 695 F.2d 175, 179 (5th Cir. 1983). In fact, “a law clerk is probably the one participant in the judicial process whose duties and responsibilities are most intimately connected with the judge’s own exercise of the judicial function.” *Oliva v. Heller*, 839 F.2d 37, 40 (2d Cir. 1988). This is not to say, however, that law clerks devoting their careers to such a position are “carried away with delusions of authority they do not have.” *Bishop*, 806 F. Supp. at 901.

³Conference Adopts Recommendations on Law Clerks, The Third Branch, www.uscourts.gov/news/TheThirdBranch/07-09-01/ConferenceAdoptsRecommendationsOnLawClerks.aspx (accessed Nov. 20, 2014).

⁴Judicial Administration and Organization: Law Clerks, Fed. Jud. Center, www.fjc.gov/history/home.nsf/page/admin_03_11.html (accessed Nov. 20, 2014).

⁵See Conference Adopts Recommendations on Law Clerks, *supra* note 3.

⁶*Id.*

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Last but not least, the committee addressed the appendix of forms provided for by Rule 84. Recognizing that Rule 84 was originally adopted in 1938 when the Civil Rules were established, the committee observed that many of the forms were out of date, amendment of the forms would be time-consuming, and multiple alternative sources existed for forms. As the committee characterized it, it was time to “get out of the forms business.”

In Closing

In connection with Rule 1’s goal of the “just, speedy, and inexpensive determination of every action and proceeding,” the amendments proposed by the committee contain a series of significant steps that seek to expedite early pretrial stages, bring clarity to many facets of discovery, and redefine a party’s ESI obligations. If approved by the Supreme Court and subsequently Congress, the amendments are

scheduled to take effect Dec. 1. Practitioners are advised to proactively research how these changes may affect their practice areas. (Interested parties are encouraged to visit the U.S. Courts website, which contains extensive information on the changes to the FRCP, including reports of the Judicial Conference Committee on Rules of Practice and Procedure.) ☺



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