Sidebar

Summer 1991

The Federal Bar Association's

# Federal Litigation Section

## Section Chair's Message

This is my last opportunity to remind you to make plans to attend the Section's Members Only Reception, September 26, 3:00-4:30 p.m., Mayflower Hotel, Washington, D.C. (Another reason why you should attend the National Convention!). It will be a wonderful opportunity to meet and exchange ideas with other litigators.

You will notice from the "article" in this newsletter that the Section has been tracking the proposed changes to the Federal Rules of Civil Procedure. We have requested that the standing committee keep the Section advised. We hope to have the opportunity to submit comments regarding the final proposed changes. Because all civil practitioners will be affected by the proposed changes in discovery rules, I am sure that, when given the opportunity, judges and litigators will provide their comments.

The Section has continued to assist and support local Chapters in presenting Federal Practice Seminars. The Western Washington Chapter had a very successful seminar on "Introduction to the Federal Courthouse" held in Seattle, Washington. In late August, the Iowa Chapter is presenting a "Seminar on Alternate Dispute Resolution," which I am sure will also be a success.

The major activity planned for the fall is the "Symposium on the Law of Aircraft Registration and Lien Recordation," which the Litigation Section is presenting with the Oklahoma Chapter and the Transportation Law Section on November 7th and 8th in Oklahoma City. This is a rare opportunity to learn the intricacies of this unique area of law.

I look forward to seeing you at the Reception in Washington, D.C.

Sincerely,
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## Proposed Changes in the Federal Rules

**By David Hupp***

**Introduction**

Whether you know it or not, a number of important changes appear to be in store for the Federal Rules of Civil Procedure. Those changes are currently being considered by a committee of the Judicial Conference of the United States. If adopted, they could substantially change the manner in which civil actions are litigated in federal courts.

Many of the proposed changes would directly affect pre-trial discovery. What follows is a brief review of some of the more fundamental changes in discovery practice that are now under consideration.

**FRCP 16**

Rule 16 now requires that a scheduling order be issued "as soon as practical but in no event more than 120 days after filing of the complaint." Under the proposed Rule 16, the order would have to be issued no later than sixty days after the appearance of a defendant.

**FRCP 26**

Under the present system, the parties to a civil action are given a great deal of freedom in conducting discovery. It is up to them to decide what information to seek and how to obtain it. Under the proposed changes, however, this would no longer be the case.

Under the proposed Rule 26, for example, parties would be required to disclose certain specific types of information. The disclosures are divided into three categories: initial disclosures, disclosure of expert testimony, and pretrial disclosures.

All of the disclosures must be in writing and must be signed, and must be filed with the court. If a party is represented by counsel, the disclosures must be signed by at least one attorney of record. The person signing each disclosure is required to read it and make a

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reasonable effort to ascertain that the disclosure is complete as of the time made.

Initial disclosures include information about potential witnesses, documents and other physical evidence, damages, and insurance.

More specifically, each party would be obligated to provide: a) the name, and, if available, the address and telephone number of anyone "reasonably likely" to have information that bears "significantly" on the claims and defenses, and identifying what subjects they know about; b) a general description (including the location) of any documents, data compilations, and tangible things in the party's possession, custody, or control that are "reasonably likely" to bear "significantly" upon the claims or defenses; c) the computation of any category or damages; and d) the existence and contents of any agreement making an insurer liable for part or all of a judgment.

In addition, each party must make available for inspection and copying any evidence used as the basis for that party's damage computations, and any insurance agreements.

These disclosures would normally have to be made by a plaintiff within thirty days after service of an answer, and by a defendant within thirty days after service of its own answer.

However, any party which has appeared in the case may be served with a written demand for early disclosure. The written demand must be accompanied by the demanding party's initial disclosures. In that situation, disclosure is due within thirty days after service of the written demand.

It would appear that the provision for early disclosure would be applicable only to plaintiffs and to those defendants who file a 12(b)(6) motion rather than an answer.

The proposed Rule 26 also contemplates that the parties' initial disclosures would usually be the first step in the discovery process. Under that proposal, a party normally cannot engage in any discovery until it has made the initial disclosures specified above. In addition, a party normally cannot seek discovery from another party whose initial disclosures have not yet been made and are not yet due. In other words, a party's failure to make its initial disclosures would bar it from engaging in discovery, but would not prevent it from being subject to discovery.

However, these normal prohibitions do not prevent discovery done either by leave of court or by agreement with the other parties. In addition, one of the changes proposed in Rule 30 would permit the deposition of a person about to leave the United States, even though initial disclosures have not yet been made and leave of court has not been obtained.

The additions to Rule 26 would also require disclosure of information pertaining to expert testimony which may be presented at trial. The disclosure would be in the form of a written report prepared and signed by the expert.

The information to be provided includes a complete statement of all opinions to be expressed by the expert, the basis and reasons for those opinions, the information relied upon for those opinions, any exhibits to be used as a summary of or in support of those opinions, the expert's qualifications, and a listing of any other cases in which the expert has testified as an expert at trial or in deposition during the preceding four years.

The expert's report must be disclosed at least ninety days before trial, unless his testimony will be used solely to rebut expert testimony offered by another party. In that latter situation, the deadline for disclosure is thirty days after the other party discloses its expert's report.

Once the report has been provided, the expert may be deposed by any party. This is important because the proposed changes in Rule 32 permit the expert's deposition to be used at trial for any purpose whether or not the expert is available to testify.

Pretrial disclosures included information about witnesses, the use of depositions at trial, and exhibits. The party making the disclosure must name each witness, provide the witness's address and telephone number if it has not previously been provided, and separately identify those witnesses the party expects to present and those whom the party may call if the need arises. The party must also disclose which witnesses' testimony will be presented by means of a deposition, and, if that deposition has not been taken by a stenographer, the party must provide a transcript of the pertinent portions of the deposition testimony. Finally, the party must identify each exhibit, including summaries of other evidence, and must separately identify which exhibits the party expects to offer and which the party may offer if the need arises.

Pretrial disclosures must be made at least thirty days before trial. The other parties then have fourteen days to file objections to the proposed deposition testimony and to the admissibility of exhibits. Any objections not made, other than those under Rules 402-03 of the Federal Rules of Evidence, shall be deemed waived unless excused by the court for good cause shown.

All of the foregoing disclosures must be supplemented if the party learns that the information disclosed is not complete and true. With respect to expert testimony, the duty to supplement applies both to the expert's report and to the expert's deposition testimony. This is a different standard than that which now applies, and which would continue to apply even after the rule changes, to interrogatories, requests for production, and requests for admissions. Under the latter standard, responses need be amended only if the response was incorrect when made, or is no longer true and the circumstances are such that a failure to amend amounts to a knowing concealment.

A final change in Rule 26 affects the availability of protective orders. To obtain a protective order under the proposed rule, the movant must provide a certificate that the movant has conferred with the other affected parties in a good faith effort to resolve the dispute without court action. A similar requirement applies to motions to compel discovery made under Rule 37.

**FRCP 30 and 31**

Several fundamental changes have also been proposed in the way depositions are conducted. At present, depositions are routinely taken without leave of court. Most of the proposed changes

specify circumstances in which parties must obtain leave of court for a deposition.

If the plaintiffs or the defendants have taken ten depositions in a case, whether under Rule 30 or Rule 31, they would not be able to take additional depositions without leave of court. If a particular person has already been deposed in the case, that person could not be deposed again without leave of court.

In addition, the proposed changed would limit actual examination of the deponent to six hours, unless otherwise authorized by the court or by agreement between the parties. The proposal also permits sanctions to be imposed on any person, even a non-party witness, whose obstructive tactics unduly prolong a deposition. As noted before, leave of court would also normally be needed for a party to depose a witness before the time specified in Rule 26 for engaging in discovery. As previously noted, however, there is an exception. Leave of court is not necessary if the deposition notice contains a certification, with supporting facts, that the person to be examined is about to leave the United States and will be unavailable for examination within the United States unless the deposition is taken before the time specified in Rule 26.

On the other hand, the proposed changes also authorize parties to record deposition testimony by non-stenographic means without first having to obtain leave of court or agreement from other counsel, and specifies the manner in which a recorded deposition shall be conducted.

The proposal for Rule 31 would also severely restrict the time needed for depositions taken on written questions. The present rule permits up to fifty days for developing cross-examination, redirect, and recross questions. The proposal would cut this time to just twenty-eight days.

**FRCP 32**

Two major changes have also been proposed in Rule 32 regarding the use of depositions at trial. As previously noted, the proposals permit the use at trial of an expert's deposition taken pursuant to the proposed Rule 26(b)(4).

The second major change would prohibit the use of a deposition at trial against a party which has had only minimal notice of a proposed deposition and has been unable to obtain a court ruling on its motion for a protective order prior to the deposition. This protects a party which has had less than eleven days actual notice, and which has filed a motion for a protective order promptly and with good cause, from the risk of non-attendance.

**FRCP 33**

Rule 33 does not now place any limit upon the number of interrogatories which may be served. The proposal would change this, by limiting the number of interrogatories served by one party upon another to fifteen, including all subparts. Part of the rationale for this is the expectation that the compulsory disclosures required under Rule 26 will eliminate the need for many of the interrogatories now served as a matter of course.

The proposal would also change that portion of Rule 33 which permits a party to avoid answering any part of an interrogatory by stating an objection in lieu of an answer. Instead, it would require that an interrogatory which is objectionable must be answered to the extent that it is not objectionable.

**FRCP 37**

Under the proposed amendments, a party's failure to make any of the disclosures required by the additions to FRCP 26 (discussed above), entitles any other party to seek an order compelling those disclosures and imposing appropriate sanctions. However, the motion must be accompanied by a certification that the movant has conferred with the party not making the disclosure in a good faith effort to secure the disclosure without court action. In fact, the proposed amendments to this rule would impose upon parties seeking to compel discovery the duty to make a good faith effort to obtain the discovery without court action, and to certify that they have done so when asking the court to compel discovery.

Finally, the proposed amendments specifically provide that a party's failure to disclose certain information is grounds for prohibiting the party from presenting that evidence at trial or on a motion for summary judgment. In fact, if that same evidence is subsequently presented by an adverse party, that adverse party shall be permitted to reveal at the trial that the information was not revealed voluntarily.

**Conclusion**

The proposed changes in discovery are by no means the only changes now under consideration. Changes are also being considered, for example, in Rule 11 (sanctions), Rule 54 (creating a time limit for seeking attorney's fees), and Rule 56 (motions for summary judgment). However, the vast majority of those changes now under consideration pertain to discovery, and could substantially change the way it is conducted. Whether or not all of them are eventually accepted, the proposals reflect the belief that the discovery process is not now accomplishing its purposes effectively, and needs to be changed substantially.

## Information Exchange

# ATTENTION!

## ALL SECTION MEMBERS

The newsletter should provide the opportunity to share information and expertise with fellow Litigation Section members. We will be experimenting with formats to identify attorneys with cases similar to yours, attorneys who will make themselves available for free consultation (within reason of course). Currently, only the Section Chair and Newsletter Editor have signed up. If you would like to hang your shingle here, please contact the editor.

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# On The Case

**By Mark Lee Hogge**

**"Talking to jurors can cause mistrials"**

I was recently involved with trying a big patent case (set for two months) to a ten-person jury. (The case was being tried backwards as it was a declaratory judgment case.) After about a month of trial, the accused infringers' case was just about finished except for some loose ends. At the end of the day, after the jurors were excused and the court was recessed, three jurors walked into the courtroom and up to an expert for the accused infringers. They conversed until the court's bailiff led the jurors away. A mistrial was declared the following day. The court discovered that the expert for the accused infringers had two prior contacts, outside of the courtroom, with members of the jury panel. The jurors had been admonished in the usual fashion—daily. The expert was not only a witness, he was a senior member of the bar. Needless to say, the wasted expense of a big mistrial is phenomenal and should be avoided at all costs.

Next time you are trying a jury case, be sure the jury heeds the court's admonition and be sure the admonition is explanatory and extensive. Jurors should be admonished from discussing the case and from having ***any*** communications with the parties, witnesses, and attorneys. It should be explained to jurors that if the parties, witnesses, or attorneys are aloof, or even seemingly rude to the jurors, it is because it is ***illegal*** to talk to or otherwise communicate to the jurors without leave of court.

## Check Off Your Calendar!

✔The FBA Convention, September 26-28, Mayflower Hotel, Washington, D.C., includes sessions on the Limitations Abroad on Practice by U.S. Lawyers, Internationalization of the Regulatory Process, and International Environmental Regulation.

✔The Section's Members Only Reception, September 26, 3:00-4:30 p.m., Mayflower Hotel, Washington, D.C.

✔"Symposium on the Law of Aircraft Registration and Lien Recordation" which the Litigation and Transportation Law Sections are presenting with the Oklahoma Chapter on November 7 and 8 in Oklahoma City.

*For more info, call (202) 638-0252.*

*Sidebar* is published quarterly by the Federal Litigation Section of the Federal Bar Association. The views expressed herein do not necessarily represent those of the FBA. Send any and all articles or other contributions you may have to Mark Lee Hogge at Fisher, Christen, & Sabol, Suite 590, 2000 M Street, N.W., Washington, D.C. 20036, (202) 659-2000.

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