EXAMINING THE 2015 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

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INTRODUCTION

On December 1, 2015, the Federal Rules of Civil Procedure saw a major overhaul as the latest amendments came into effect. Subject to amendment are Rules 1, 4, 16, 26, 30, 31, 33, 34, 37, and 55.[1] These amendments are implemented with the goal of improving case management and reducing costs. This article will summarize the changes as well as the practical implications of the 2015 amendments. In addition, the complete language of the amended rules can be found at the end of this article.

CHANGES TO EARLY CASE MANAGEMENT: AMENDED RULES 1, 4(M), 16(B) AND 26(F)

The amendments to Rules 1, 4(m), 16(b) and 26(f) are effected with the intention of enhancing collaboration and expediting the early stages of litigation. To this end, the Rules Committee calls for more active judicial case management in its amended Rule 1. This is accomplished through the addition of the language "*employed by the court and the parties"* which imposes the same standard on *all* parties to work together towards achieving a "just, speedy, and inexpensive determination" of the matter.[2]

Similarly, the amendments to Rules 4(m), 16(b) and 26(f) seek to reduce delay by shortening several deadlines. First, amended Rule 4(m) reduces the time period for serving a defendant from 120 days to 90 days. Second, Rule 16(b)(2) now requires that a judge issue a scheduling order within 90 days (previously 120 days) after any defendant has been served or 60 days (previously 90 days) after any defendant has appeared. The court, however, may set a later date for issuing an order upon a finding of good cause.[3]

Third, the amended Rule 16(b)(1)(B) strikes the provision for holding a scheduling conference by "telephone, mail, or other means." The Committee Notes indicate that a scheduling conference may be held in person, by telephone, or by more sophisticated electronic means.[4]

Fourth, three new topics for inclusion in scheduling orders are added at Rule 16(b)(3)(B): the preservation of Electronically Stored Information ("ESI"); agreements under Federal Rule of Evidence 502 (governing attorney-client privilege and work product); and the option to request a conference with the court before a movant files a motion for an order on discovery.[5] As far as

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[1] In addition, the 2015 changes abrogate Rule 84 and the Appendix of Forms as the Rules Committee deemed them no longer necessary.
[2] Fed. R. Civ. P. 1.
[3] *See* Fed. R. Civ. P. 16 committee's notes.
[4] *See id*. This change is implemented based on the Rules Committee's belief that the scheduling conference is more effective if the parties are present to engage in "direct simultaneous communication."
[5] Fed. R. Civ. P. 16(b)(3)(B).

the latter, the new Rule 16(b)(3)(v) now permits a scheduling order to "direct that before moving for an order relating to discovery the movant must request a conference with the court."[6] The hope for this new rule is it will force attorneys to address these issues early on and avoid costly disputes down the road.

Fifth, Rule 26(f) is amended to add the preservation of ESI as a topic to be included in the discovery plan. This change reflects an overall theme in the 2015 amendments to modernize the rules in light of the increasing use of e-discovery.

From a practical standpoint, the new language and shortened time periods are intended to expedite the initial stages of litigation and force the parties to meet and confer at an earlier date. These amendments and the accompanying Committee Notes encourage parties to make the most of scheduling conferences by addressing potential discovery issues.

SCOPE OF DISCOVERY: THE NEW "PROPORTIONALITY" STANDARD UNDER AMENDED RULE 26(B)

One of the most significant changes in the 2015 amendments is the shift to a proportionality standard in defining the scope and limits of discovery. Under the old Rule 26(b)(1), information was discoverable if it was "reasonably calculated to lead to the discovery of admissible evidence."[7] This phrase has been removed and the amended Rule 26(b)(1) redefines and limits the scope of discovery to information that is relevant to any party's claim or defense and is "*proportional to the needs of the case . . . .*"[8] The proportionality factors are delineated in Rule 26(b)(1). These factors include: the importance of the issues at stake; 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 benefits.[9]

Despite this new proportionality language, the rule remains that discovery cannot be overly burdensome. Similarly, the proportionality factors, while relocated[10], are not new. Nevertheless, in responding to discovery requests attorneys should keep in mind this new language and change any objection on the basis that the request is "not reasonably calculated to lead to the discovery of admissible evidence" to the request is "not proportional to the needs of the case."

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[6] Fed. R. Civ. P. 16(b)(3)(v).
[7] *See* Fed. R. Civ. P. 26 committee's notes.
[8] Fed. R. Civ. P. 26(b)(1) (emphasis added).
[9] Fed. R. Civ. P. 26(b).
[10] The proportionality factors were moved from Rule 26(b)(2)(C)(iii) to Rule 26(b)(1).

CHANGES TO REQUESTS FOR PRODUCTION OF DOCUMENTS: AMENDED RULES 26(D), 34(B), AND 37(A)

The amendments to Rules 26(d), 34(b), and 37(a) alter the timing of requests for production of documents in several ways. First, the addition of Rule 26(d)(2) allows a party to deliver Rule 34 requests for production of documents in advance of the Rule 26(f) conference, but no earlier than 21 days after the receiving party was served.[11] The Committee Notes indicate that delivery does not count as service; rather, the requests are considered served at the first Rule 26(f) conference.[12]

This change is implemented to encourage discussion at the Rule 26(f) conference. The time to respond to a Rule 34 request delivered prior to the Rule 26(f) conference is 30 days after the Rule 26(f) conference.[13] Also, the Committee Notes point out that advanced delivery prior to the 26(f) conference does not impact the decision to allow additional time to respond. Rule 34(b) was amended in accordance with Rule 26(d)(2).[14]

A more substantial change was made to Rule 34(b)(2)(B) which now requires parties to state objections to Rule 34 requests with specificity in lieu of boilerplate objections.[15] In conformity with amended Rule 34(b)(2)(C), objections to Rule 34 requests must: state whether any responsive materials are being withheld on the basis of each objection, state whether copies will be produced or inspection permitted, and allow reasonable time for production.[16] This means parties must state whether documents will be withheld pursuant to each objection.

The Committee Notes further explain that the producing party does not need to provide a log of withheld documents, but the producing party must inform the other parties that documents have been withheld. Pursuant to the 34(b) amendments, attorneys will need to be more specific in their objections to Rule 34 requests. For example, in objecting to a Rule 34 request as unduly burdensome, attorneys now have to state how the request is unduly burdensome.

Finally, amended Rule 37(a)(3)(B)(iv) is implemented "to reflect the common practice of producing copies of documents or electronically stored information rather than simply permitting inspection."[17] Pursuant to this amendment, a party may move to compel production if another party fails to produce documents.

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[11] Fed. R. Civ. P. 26(d)(2).
[12] Pursuant to Rule 34(b)(2)(A), the time to respond runs from the date of service. Fed. R. Civ. P. 26 committee's notes.
[13] *See* Fed. R. Civ. P. 34(b)(2)(A).
[14] Fed. R. Civ. P. 34(b).
[15] *See* Fed. R. Civ. P. 34(b)(2)(B).
[16] *See* Fed. R. Civ. P. 34(b)(2)(C).
[17] Fed. R. Civ. P. 37 committee's notes.

ESI PRESERVATION: AMENDED RULE 37(E)

In response to a circuit split, the new Rule 37(e) provides a uniform standard for courts to apply in handling failures to preserve ESI.[18] Rule 37(e) applies exclusively to ESI and gives the court broad discretion to impose sanctions or otherwise cure failures to preserve ESI.[19] This is another significant change to the rules.

Determining whether Rule 37(e) applies involves three steps. As an initial matter, a party moving for sanctions for failure to preserve ESI must show the ESI should have been preserved in anticipation of litigation.[20] Next, the movant must show that the relevant ESI was lost because the party failed to take reasonable measures to preserve the ESI.[21] As explained further in the Committee's Notes, this reasonableness standard does not demand perfection in preserving all relevant ESI but does take into consideration a party's overall "sophistication with regard to litigation in evaluating preservation."[22] Another factor to be considered in evaluating reasonableness is proportionality. The proportionality factor allows the court to take costs into consideration in evaluating preservation methods."[23] Finally, the movant must show the lost ESI cannot be restored or replaced.[24] If the preceding showings can be made, the court then proceeds to evaluate whether another party was prejudiced by the loss of ESI or whether there was "intent to deprive."[25]

If the court finds that the loss of ESI prejudiced another party, the court may order measures "no greater than necessary to cure the prejudice."[26] This does not include the most severe remedies of an adverse inference instruction or dismissal. Rule 37(e) does not place the burden of proving or disproving prejudice on one party or the other.

If the court finds a more severe "intent to deprive," then the court may refer to the available remedies found in 37(e)(2)(A)-(C). Said remedies include: 1) a presumption that the lost information was unfavorable to the party, 2) an instruction to the jury that it may or must presume the information was unfavorable to the party, or 3) dismissal of the action or entry of a default judgment.[27]

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[18] The duty to preserve ESI is not a new duty, rather amended Rule 37(e) codifies the common-law duty to preserve relevant ESI in anticipation of litigation.

[19] *See* Fed. R. Civ. P. 37 committee's notes. The Rule does not provide a list of available remedies, however, based on existing case law financial penalties, payment of attorneys' fees, and evidentiary limitations may be appropriate.

[20] *See id*. A motion for sanctions is only appropriate 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." *Id.*

[21] *See id*.

[22] Fed. R. Civ. P. 37 committee's notes.

[23] *Id*. The proportionality factor allows the court to take costs into consideration in evaluating preservation methods. For example, the Committee Notes acknowledge that a party "may act reasonably by choosing a less costly form of information preservation, if it is substantially as effective as more costly forms." *Id.*

[24] *See id*.

[25] Fed. R. Civ. P. 37(e)(2).

[26] Fed. R. Civ. P. 37(e)(1).

[27] Fed. R. Civ. P. 37(e)(2)(A)-(C).

DEFAULT JUDGMENTS: AMENDED RULE 55(C)

As amended, Rule 55(c) seeks to clarify the relationship between Rules 54(b), 55(c), and 60(b). The previous version of Rule 55(c) stated that "the court may set aside an entry of default for good cause, and it may set aside a default judgment under Rule 60(b)."[28] The amendment to Rule 55(c) adds the word "final" before "default judgment." The addition of the word "final" clarifies that Rule 60(b) does not apply to non-final default judgments.[29] Further, the Committee Notes make clear that a default judgment that does not dispose of all claims is not a final judgment unless the court directs entry of final judgment under 54(b).

CONCLUSION

The 2015 amendments to the Federal Rules of Civil Procedure introduce new language that will alter the initial stages of litigation and the discovery process. Attorneys should be mindful of the new language and familiarize themselves with these changes and the corresponding practical implications. Furthermore, given the numerous amendments concerning ESI, attorneys should discuss ESI, including social media accounts, and retention issues with clients early on.

THE AMENDED RULES

Below are the amended rules with emphasis added where appropriate to indicate changes.

Amended Rule 1

> 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, administered, *and employed by the court and the parties* to secure the just, speed, and inexpensive determination of every action and proceeding.

Amended Rule 4(m)

> TIME LIMIT FOR SERVICE. If a defendant is not served within *120* ~~*90*~~ *days* after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1) or to service of a notice under Rule 71.1(d)(3)(A).

Amended Rule 16(b)

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[28] Fed. R. Civ. P. 55.
[29] Fed. R. Civ. P. 55 committee's notes.

(b) SCHEDULING.

(1) *Scheduling Order.* Except in categories of actions exempted by local rule, the district judge—or a magistrate judge when authorized by local rule—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 ~~or by telephone, mail, or other means~~.

(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~~ 90days after any defendant has been served with the complaint or ~~90~~60 days after any defendant has appeared.

(3) *Contents of the Order*.

(A) *Required Contents.* The scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions.

(B) *Permitted Contents.* The scheduling order may:

(i) modify the timing of disclosures under Rules 26(a) and26(e)(1);

(ii) modify the extent of discovery;

(iii) provide for disclosure, ~~or~~ discovery, *or preservation of electronically stored information*;

(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*;

(v) direct that before moving for an order relating to discovery, the movant must request a conference with the court;

(~~v~~vi) set dates for pretrial conferences and for trial; and

(~~vi~~vii) include other appropriate matters.

(4) *Modifying a Schedule.* A schedule may be modified only for good cause and with the judge's consent.

Amended Rule 26(b)(1)

(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*. ~~—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)~~.

Amended Rule 26(b)(2)(C)(iii)

(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) the ~~burden or expense of~~ proposed discovery is outside the scope permitted by Rule 26(b)(1)~~outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues~~.

Amended Rule 26(d)

(d) TIMING AND SEQUENCE OF DISCOVERY.

(1) Timing. A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.

(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.

(~~2~~3) Sequence. Unless~~, on motion,~~ *the parties stipulate* or the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(A) methods of discovery may be used in any sequence; and

(B) discovery by one party does not require any other party to delay its discovery.

Amended Rule 26(f)(3)(C)

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

(A) 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;

(B) 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;

(C) any issues about disclosure, ~~or~~ discovery, or preservation of electronically stored information, including the form or forms in which it should be produced;

Amended Rules 30-33

Rules 30, 31, and 33 refer to amended Rule 26(b)(1) and incorporate its emphasis on proportionality.

Amended Rule 34(b)(2)(B)

(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 *with specificity the grounds for objecting* to the request, including the reasons. *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.*

Amended Rule 34(b)(2)(C)

(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.

Amended Rule 37(e)

(e) FAILURE TO PRESERVE ELECTRONICALLY STORED INFORMATION. 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
(C) dismiss the action or enter a default judgment.

Rule 55

(c) SETTING ASIDE A DEFAULT OR A DEFAULT JUDGMENT. The court may set aside an entry of default for good cause, and it may set aside a *final* default judgment under Rule 60(b).

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