Federal Rule Changes Affecting E-Discovery Are Almost Here - Are You Ready This Time?

An Overview of the Rules, History and Commentary

Absent congressional action to reject, modify or defer proposed amendments approved by the U.S. Supreme Court earlier this year, amendments to rules 1, 4, 16, 26, 30, 31, 33, 34, 37, 55, and 84 of the Federal Rules of Civil Procedure ***will become effective on December 1, 2015.*** Getting a head start on thinking about how your litigation (and pre-litigation) strategies or practices may be affected by these important amendments is highly recommended.

Appendix A contains the redline text of the amendments.[1] Click on hyperlinked Rules throughout this article to move between the article and the appendix.

Many of the rule amendments make up what is known as the "Duke Rules Package," addressing issues identified for consideration by the Advisory Committee on Civil Rules ("the Committee") following the 2010 Duke Conference on Civil Litigation. Specifically, the Committee recognized the "near-unanimous agreement … that the disposition of civil actions could be improved by advancing cooperation among parties, proportionality in the use of available procedures, and early judicial case management."[2] Notably, a panel on e-discovery also "unanimously recommended that the Committee draft a rule to deal with the preservation and loss of electronically stored information ('ESI')."[3] The proposed amendments reflect these recommendations.

Cooperation

The proposed amendment to Rule 1 "would provide that the rules 'be construed, administered, *and employed by the court and the parties* to secure the just speedy and inexpensive determination of every action and proceeding.'"[4] Per the Committee, this amendment is intended to "make clear that parties as well as courts have a responsibility to achieve the just, speedy, and inexpensive resolution of every action."[5] As reflected in the proposed Advisory Committee Note, however, the change would not "create a new or independent source of sanctions."[6]

---

[1] This discussion will address the substantive proposed amendments and will note minor proposed amendments in the footnotes only.

[2] THE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, APPENDIX B at B-2 (Sept. 2014) (hereinafter "REPORT OF COMMITTEE"), available here http://www.uscourts.gov/rules-policies/archives/committee-reports/reports-judicial-conference-september-2014.

[3] *Id.* at B-2.

[4] *Id.* at B-13.

[5] *Id.*

[6] *Id.* at B-22.

Discovery

Several proposed amendments fall into this category, including amendments to Rule 26 and to Rule 34.[7]

Rule 26

There are a number of proposed amendments to Rule 26. In what are arguably the most significant, the Committee proposes to eliminate discovery regarding "any matter relevant to the subject matter involved in the action"—potentially a substantial reduction in the scope of discovery in certain cases—and to move the proportionality factors from current Rule 26(b)(2)(C)(iii) into Rule 26(b)(1)[8] although ordered to avoid "any implication that the amount in controversy is the most important concern,"[9] and with one additional factor, "the parties' relative access to relevant information."[10]

The proposed movement of the proportionality factors garnered the most attention during the rulemaking process. Per the Committee, the move is intended to "make them an explicit component of the scope of discovery, requiring parties and courts alike to consider them when pursuing discovery and resolving discovery disputes."[11] The amendment would not, as some fear, "place on the party seeking discovery the burden of addressing all proportionality considerations."[12] Nor is the proposed rule "intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional."[13] Rather, "[t]he parties and the court [would] have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes."[14]

Regarding the proposed amendment to narrow the scope of discovery, the Committee explained that "[i]n [its] experience, the subject matter provision is virtually never used, and the proper focus of discovery is on the claims and defenses in the litigation."[15]

Two other proposed amendments to Rule 26(b)(1) would delete the rule's description of what is discoverable ("the existence, description, nature, custody, condition and location of any documents …") and would rewrite the sentence addressing admissibility to "curtail reliance on the 'reasonably calculated' phrase to define the scope of discovery."[16]

Another important proposed amendment to Rule 26 would add *an entirely new procedural option* (Rule 26(d)(2) *Early Rule 34 Requests* - bumping current Rule 26(d)(2) to 26(d)(3)[17]) and allow parties to make early delivery of Rule 34 document production requests *prior* to the Rule

[7] An amendment to Rule 37(a)(3)(B)(iv) is also proposed, to account for proposed changes to Rule 34.
[8] As a result of the proposed relocation of the proportionality factors, Rule 26(b)(2)(C)(iii) would be amended to refer back to Rule 26(b)(1), and allow the court to limit discovery "outside of the scope permitted by Rule 26(b)(1)." Rules 30, 31, and 33 would also be amended to "reflect the recognition of proportionality in Rule 26(b)(1)."
[9] REPORT OF COMMITTEE, *supra* note 2, at B-8.
[10] REPORT OF COMMITTEE, *supra* note 2, at B-8.
[11] REPORT OF COMMITTEE, *supra* note 2, at B-8.
[12] REPORT OF COMMITTEE, Proposed Rule 26 Committee Note, *supra* note 2, at B-39.
[13] REPORT OF COMMITTEE, Proposed Rule 26 Committee Note, *supra* note 2, at B-39.
[14] REPORT OF COMMITTEE, Proposed Rule 26 Committee Note, *supra* note 2, at B-39.
[15] REPORT OF COMMITTEE, *supra* note 2, at B-9.
[16] REPORT OF COMMITTEE, *supra* note 2, at B-10.
[17] Rule 26(d)(3) would be "renumbered and amended to recognize that the parties may stipulate to case-specific sequences of discovery."

26(f) conference.[18] The requests would be considered *served* as opposed to *delivered*—an important distinction—at the first 26(f) meeting. "The purpose of this change is to facilitate discussion between the parties at the Rule 26(f) meeting and with the court at the initial case management conference by providing concrete discovery proposals."[19]

An additional proposed amendment to Rule 26 would make explicit the ability of the court to allocate expenses under Rule 26(c)(1)(B).

Rule 34

Three substantive amendments are proposed for Rule 34, intended to:

> . . . eliminate three relatively frequent problems in the production of documents and ESI: the use of broad, boilerplate objections that provide little information about the true reason a party is objecting; responses that state various objections, produce some information, and do not indicate whether anything else has been withheld from discovery on the basis of the objections; and responses which state that responsive documents will be produced in due course, without providing any indication of when production will occur and which often are followed by long delays in production.[20]

The first proposed amendment would require "that objections to requests to produce be stated 'with specificity.'"[21] The second would permit a responding party "to state that it will produce copies of documents or ESI instead of permitting inspection, and should specify a reasonable time for production."[22] The third would require that "an objection state whether any responsive materials are being withheld on the basis of the objection."[23] Regarding the third proposal, the proposed Committee Note clarifies that "[t]he 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"[24] and that "[a]n 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.'"[25]

Early Judicial Case Management

As reported by the Committee, participants in the Duke Conference on Civil Litigation "agreed that cases are resolved faster, fairer, and with less expense when judges manage them early and actively."[26] Accordingly, proposed changes to Rules 4 and 16 are intended to "promote earlier and more active judicial case management."[27]

---

[18] A corresponding amendment to Rule 34(b)(2)(A) is also proposed, to account for the proper timing to respond under Proposed Rule 26(d)(2).
[19] REPORT OF COMMITTEE, *supra* note 2, at B-11.
[20] REPORT OF COMMITTEE, *supra* note 2, at B-11.
[21] REPORT OF COMMITTEE, *supra* note 2, at B-11.
[22] REPORT OF COMMITTEE, *supra* note 2, at B-11; "A corresponding change to Rule 37(a)(3)(B)(iv) adds authority to move for an order to compel production if 'a party fails to produce documents' as requested."
[23] REPORT OF COMMITTEE, *supra* note 2, at B-11.
[24] REPORT OF COMMITTEE, Proposed Rule 34 Committee Note, *supra* note 2, at B-54.
[25] REPORT OF COMMITTEE, Proposed Rule 34 Committee Note, *supra* note 2, at B-54.
[26] REPORT OF COMMITTEE, *supra* note 2, at B-12.
[27] REPORT OF COMMITTEE, *supra* note 2, at B-11.

Rule 16

"Four sets of changes are proposed for Rule 16."[28] First, to encourage direct exchanges between the parties and with the court, the Committee has proposed to delete the words in Rule 16(b)(1)(B) which allow a conference to be held "by telephone, mail, or other means."[29] Per the proposed Committee Note, "[a] scheduling conference is more effective if the court and parties engage in direct simultaneous communication."[30] Thus, the proposed Note further instructs that "[t]he conference may be held in person, by telephone, or by more sophisticated electronic means."[31]

Second, "to encourage early management of cases by judges,"[32] "the time to issue the scheduling order [would be] reduced to the earlier of 90 days (not 120 days) after any defendant has been served, or 60 days (not 90 days) after any defendant has appeared."[33] The rule would allow a judge to set a later time for good cause.

A third proposed amendment would add two subjects to the list of issues that may be addressed in a case management order: "the preservation of ESI and agreements reached under Federal Rule of Evidence 502."[34] The topics would also be added to the provisions of a discovery plan pursuant to Rule 26(f)(3).

Finally, the Committee proposes to amend Rule 16 to "identify another topic for discussion at the initial case management conference—whether the parties should be required to request a conference with the court before filing discovery motions."[35] In support of this proposal the Committee noted that "[m]any federal judges require such pre-motion conferences, and experience has shown them to be very effective in resolving discovery disputes quickly and inexpensively."[36]

Rule 4

A proposed amendment to Rule 4 would reduce the time for service following filing of the Complaint from 120 to 90 days.[37] "The intent, as with the similar Rule 16 change, is to get cases moving more quickly and shorten the overall length of litigation."[38]

---

[28] REPORT OF COMMITTEE, *supra* note 2, at B-12.
[29] REPORT OF COMMITTEE, *supra* note 2, at B-12.
[30] REPORT OF COMMITTEE, Proposed Rule 16 Committee Note, *supra* note 2, at B-27.
[31] REPORT OF COMMITTEE, Proposed Rule 16 Committee Note, *supra* note 2, at B-27.
[32] REPORT OF COMMITTEE, *supra* note 2, at B-12.
[33] REPORT OF COMMITTEE, Proposed Rule 4 Committee Note, *supra* note 2, at B-28.
[34] REPORT OF COMMITTEE, *supra* note 2, at B-12.
[35] REPORT OF COMMITTEE, *supra* note 2, at B-12.
[36] REPORT OF COMMITTEE, *supra* note 2, at B-12.
[37] An additional proposed amendment to Rule 4 would clarify that "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)."
[38] REPORT OF COMMITTEE, *supra* note 2, at B-13.

Preservation & Sanctions: Rule 37(e)[39]

> **(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.**

While the Duke Rules Package was being developed by the aptly named "Duke Subcommittee," the "Discovery Subcommittee" was hard at work developing an entirely re-written Rule 37(e).[40] As with the Duke Rules Package, the need for a new rule addressing preservation was raised at the Duke Conference and supported by the Committee, which cited the explosion of ESI and a "significant split in the circuits"[41] regarding the necessary showings required to impose certain sanctions as the major impetus for the re-write. In its report to the Judicial Conference's Committee on Rules of Practice and Procedure (commonly known as the "Standing Committee"), the Committee also noted that it had been "credibly informed"[42] that fear of potential sanctions for actions that might in hindsight be viewed as negligent has resulted in over-preservation. Thus, addressing these issues with a new rule was deemed a "worthwhile goal."[43]

Proposed Rule 37(e) "addresses actions courts may take when ESI that should have been preserved is lost"[44] and would apply only to ESI. Specifically, the proposed rule "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."[45] As a result, the proposed rule "forecloses reliance on inherent authority or state law to determine when certain measures should

[39] Because the proposed amendment is a complete re-write, the full text of the proposed rule is provided for reference.
[40] Per the proposed Committee Note to the re-written rule, current Rule 37(e) "has not adequately addressed the serious problems resulting from the continued exponential growth in the volume of [ESI]."
[41] REPORT OF COMMITTEE, *supra* note 2, at B-14.
[42] REPORT OF COMMITTEE, *supra* note 2, at B-14.
[43] REPORT OF COMMITTEE, *supra* note 2, at B-14.
[44] REPORT OF COMMITTEE, *supra* note 2, at B-15.
[45] REPORT OF COMMITTEE, Proposed Rule 37 Committee Note, *supra* note 2, at B-58.

be used."[46] Notably, the proposed rule is limited to the loss of information that "should have been preserved" *i.e.*, that was relevant to the parties' claims and defenses, "because a party failed to take reasonable steps to preserve it." Accordingly, the proposed rule will be "inapplicable when the loss of information occurs despite the party's reasonable steps to preserve"[47] as in the case of a flood or other occurrence outside of the preserving party's control. Also of note is the Committee's recognition that "perfection in preserving all relevant electronically stored information is often impossible,"[48] and that "'reasonable steps' to preserve suffice; [the rule] does not call for perfection."[49] In keeping with the Committee's clear commitment to proportionality in discovery, the proposed Committee Note further counsels that proportionality, including consideration of the party's resources, is among the factors to be considered in evaluating reasonableness.

In addition to introducing the threshold for the rule's applicability to the loss of information, the first paragraph of the proposed rule also identifies the first remedy to be considered: additional discovery. If the lost information "is restored or replaced" through additional discovery, "no further measures should be taken."[50] The proposed Committee Note further counsels that efforts to restore or replace lost discovery should be "proportional to the apparent importance of the lost information"[51] such that "substantial measures should not be employed to restore or replace information that is marginally relevant or duplicative."[52]

Pursuant to proposed subsection (e)(1), if additional discovery will not suffice AND the requesting party is prejudiced from the loss, the court "may order measures no greater than necessary to cure the prejudice." "The [proposed] rule does not place a burden of proving or disproving prejudice on one party or the other."[53] Rather, it "leaves judges with discretion to determine"[54] how best to make that assessment. Specific measures are not identified by the proposed rule. In some cases, "serious measures"[55] such as forbidding the responsible party from putting on certain evidence or permitting argument before the jury regarding the loss may be appropriate. "Care must be taken, however, to ensure that curative measures under subdivision (e)(1) do not have the effect of measures that are permitted under subdivision (e)(2) only on a finding of intent to deprive another party of the lost information's use in the litigation."[56]

Under proposed subsection (e)(2) certain serious measures may be imposed "***only*** upon finding that the party acted with the intent to deprive another party of the information's use in the litigation."[57] "A primary purpose of this provision is to eliminate the circuit split on when a

[46] REPORT OF COMMITTEE, Proposed Rule 37 Committee Note, *supra* note 2, at B-58.
[47] REPORT OF COMMITTEE, Proposed Rule 37 Committee Note, *supra* note 2, at B-61.
[48] REPORT OF COMMITTEE, Proposed Rule 37 Committee Note, *supra* note 2, at B-61.
[49] REPORT OF COMMITTEE, Proposed Rule 37 Committee Note, *supra* note 2, at B-61.
[50] REPORT OF COMMITTEE, Proposed Rule 37 Committee Note, *supra* note 2, at B-62.
[51] REPORT OF COMMITTEE, Proposed Rule 37 Committee Note, *supra* note 2, at B-62.
[52] REPORT OF COMMITTEE, Proposed Rule 37 Committee Note, *supra* note 2, at B-62.
[53] REPORT OF COMMITTEE, Proposed Rule 37 Committee Note, *supra* note 2, at B-63.
[54] REPORT OF COMMITTEE, Proposed Rule 37 Committee Note, *supra* note 2, at B-63.
[55] REPORT OF COMMITTEE, Proposed Rule 37 Committee Note, *supra* note 2, at B-64.
[56] REPORT OF COMMITTEE, Proposed Rule 37 Committee Note, *supra* note 2, at B-64.
[57] Emphasis added.

court may give an adverse inference jury instruction for the loss of ESI."[58] More specifically, the proposed rule rejects those cases that authorized the imposition of an adverse inference upon a finding of negligence or gross negligence.

The requisite finding of intent may be made "when ruling on a pretrial motion, when presiding at a bench trial, or when deciding whether to give an adverse inference instruction at trial."[59] Moreover, if a court were to determine that the finding of intent was best left to the jury, it could instruct them accordingly, *i.e.*, by indicating that they may infer that the information was unfavorable only if they first find the requisite intent.

Unlike proposed subdivision (e)(1), proposed subdivision (e)(2) does not require a finding of prejudice resulting from the loss. "This is because the finding of intent required by the subdivision can support not only an inference that the lost information was unfavorable to the party that intentionally destroyed it, but also an inference that the opposing party was prejudiced by the loss of information that would have favored its position."[60]

Returning once again to the theme of proportionality (although not invoking the principle specifically), the proposed Committee Note counsels that caution is warranted when using the measures specified in (e)(2) and that even upon the requisite finding of intent, there is no requirement that the court adopt the measures specified. Rather, "[t]he remedy should fit the wrong, and the severe measures authorized by this subdivision should not be used when the information lost was relatively unimportant or lesser measures such as those specified in subdivision (e)(1) would be sufficient to redress the loss."[61]

Miscellaneous

Two additional amendments are proposed.

Rule 55

"The Committee proposes that Rule 55(c) be amended to clarify that a court must apply Rule 60(b) only when asked to set aside a final judgement."[62]

Rule 84

The proposed amendment would abrogate Rule 84 and its attendant Appendix of Forms. In support of this proposal, the Committee reasoned that "[m]any of the forms are out of date[,]" that "[a]mendment of the civil forms is cumbersome[,]" that "the forms are rarely used[,]" and that "[m]any alternative sources of civil forms are available."[63] "The two exceptions to this recommendation are forms 5 and 6, which are referenced in Rule 4 and would, under the proposal, be appended to that specific rule."[64]

Conclusion

[58] REPORT OF COMMITTEE, *supra* note 2, at B-17.
[59] REPORT OF COMMITTEE, Proposed Rule 37 Committee Note, *supra* note 2, at B-66.
[60] REPORT OF COMMITTEE, Proposed Rule 37 Committee Note, *supra* note 2, at B-67.
[61] REPORT OF COMMITTEE, Proposed Rule 37 Committee Note, *supra* note 2, at B-67.
[62] REPORT OF COMMITTEE, *supra* note 2, at B-20.
[63] REPORT OF COMMITTEE, *supra* note 2, at B-19.
[64] REPORT OF COMMITTEE, *supra* note 2, at B-19-20.

The amendments to the Federal Rules of Civil Procedure are poised to offer what may be the most significant and far reaching changes to the procedure and the scope of discovery in Federal Court in decades. Ranging from service to discovery, these amendments should help shape your considerations and decisions regarding how you proceed in litigation. Indeed, there is hope that proposed amendments to Rule 37(e), for example, will change the preservation analysis and thus, preservation behaviors. It is vital, therefore, to know and understand the proposed amendments and to take the opportunity now to start thinking about how your litigation strategies may be affected by these new rules.

K&L Gates' e-Discovery Analysis & Technology ("e-DAT") Group will host a CLE program to discuss the key amendments, including strategic implications of the rule changes. Watch for further announcements on the CLE program schedule on http://www.ediscoverylaw.com/.

Appendix A - Amendments

Redline Changes to Federal Rule of Civil Procedures

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.

<Return to Article>

Rule 4. Summons

****

(d) Waiving Service.

(1) ***Requesting a Waiver***. An individual, corporation, or association that is subject to service under Rule 4(e), (f), or (h) has a duty to avoid unnecessary expenses of serving the summons. The plaintiff may notify such a defendant that an action has been commenced and request that the defendant waive service of a summons. The notice and request must:

(A) be in writing and be addressed:

(i) to the individual defendant; or

(ii) for a defendant subject to service under Rule 4(h), to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process;

(B) name the court where the complaint was filed;

(C) be accompanied by a copy of the complaint, 2 copies of ~~a~~ the waiver form appended to this Rule 4, and a prepaid means for returning the form;

(D) inform the defendant, using the form appended to this Rule 4~~text prescribed in Form 5~~, of the consequences of waiving and not waiving service;

(E) state the date when the request is sent;

(F) give the defendant a reasonable time of at least 30 days after the request was sent—or at least 60 days if sent to the defendant outside any judicial district of the United States—to return the waiver; and

(G) be sent by first-class mail or other reliable means.

(2) ***Failure to Waive***. If a defendant located within the United States fails, without good cause, to sign and return a waiver requested by a plaintiff located within the United States, the court must impose on the defendant:

(A) the expenses later incurred in making service; and

(B) the reasonable expenses, including attorney's fees, of any motion required to collect those service expenses.

(3) ***Time to Answer After a Waiver***. A defendant who, before being served with process, timely returns a waiver need not serve an answer to the complaint until 60 days after the request was sent—or until 90 days after it was sent to the defendant outside any judicial district of the United States.

(4) ***Results of Filing a Waiver***. When the plaintiff files a waiver, proof of service is not required and these rules apply as if a summons and complaint had been served at the time of filing the waiver.

Appendix A - Amendments

Redline Changes to Federal Rule of Civil Procedures

(5) ***Jurisdiction and Venue Not Waived***. Waiving service of a summons does not waive any objection to personal jurisdiction or to venue.

****

(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).

****

<Return to Article>

Rule 16. Pretrial Conferences; Scheduling; Management

****

(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~~90 days 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) and 26(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;

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

(vii) include other appropriate matters.

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

Appendix A - Amendments

Redline Changes to Federal Rule of Civil Procedures

****

<Return to Article>

Rule 26. Duty to Disclose; General Provisions Governing Discovery

****

(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~~— 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).~~ 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.

(2) ***Limitations on Frequency and Extent***.

(A) *When Permitted*. By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.

(B) *Specific Limitations on Electronically Stored Information*. A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(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 the~~ 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~~.

(3) ***Trial Preparation: Materials***.

****

Appendix A - Amendments

Redline Changes to Federal Rule of Civil Procedures

(4) ***Trial Preparation: Experts***.

****

(5) ***Claiming Privilege or Protecting Trial-Preparation Materials***.

****

(c) Protective Orders.

(1) ***In General***. A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending—or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. 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:

(A) forbidding the disclosure or discovery;

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

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) requiring that a deposition be sealed and opened only on court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

(2) ***Ordering Discovery***. If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.

(3) ***Awarding Expenses***. Rule 37(a)(5) applies to the award of expenses.

(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.

(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:

Appendix A - Amendments

Redline Changes to Federal Rule of Civil Procedures

(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.

****

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

(1) ***Conference Timing***. Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable—and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b).

(2) ***Conference Content; Parties' Responsibilities***. In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

(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;

(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;

(E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(F) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

(4) ***Expedited Schedule***. If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule:

(A) require the parties' conference to occur less than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b); and

(B) require the written report outlining the discovery plan to be filed less than 14 days after the parties' conference, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

****

<Return to Article>

Appendix A - Amendments

Redline Changes to Federal Rule of Civil Procedures

Rule 30. Depositions by Oral Examination

(a) When a Deposition May Be Taken.

(1) *Without Leave*. A party may, by oral questions, depose any person, including a party, without leave of court except as provided in Rule 30(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45.

(2) *With Leave*. A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(1) and (2):

****

(B) if the deponent is confined in prison.

****

(d) Duration; Sanction; Motion to Terminate or Limit.

(1) *Duration*. Unless otherwise stipulated or ordered by the court, a deposition is limited to 1 day of 7 hours. The court must allow additional time consistent with Rule 26(b)(1) and (2) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.

(2) *Sanction*. The court may impose an appropriate sanction—including the reasonable expenses and attorney's fees incurred by any party—on a person who impedes, delays, or frustrates the fair examination of the deponent.

(3) *Motion to Terminate or Limit*.

****

<Return to Article>

Rule 31. Depositions by Written Questions

(a) When a Deposition May Be Taken.

(1) *Without Leave*. A party may, by written questions, depose any person, including a party, without leave of court except as provided in Rule 31(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45.

(2) *With Leave*. A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(1) and (2):

(A) if the parties have not stipulated to the deposition and:

****

(B) if the deponent is confined in prison.

****

<Return to Article>

Rule 33. Interrogatories to Parties

(a) In General.

(1) *Number*. Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts. Leave to serve additional interrogatories

Appendix A - Amendments

Redline Changes to Federal Rule of Civil Procedures

may be granted to the extent consistent with Rule 26(b)(1) and (2).

****

<Return to Article>

Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes

****

(b) Procedure.

(1) ***Contents of the Request***. The request:

(A) must describe with reasonable particularity each item or category of items to be inspected;

(B) must specify a reasonable time, place, and manner for the inspection and for performing the related acts; and

(C) may specify the form or forms in which electronically stored information is to be produced.

(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. 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.

(D) *Responding to a Request for Production of Electronically Stored Information*. The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form—or if no form was specified in the request—the party must state the form or forms it intends to use.

(E) *Producing the Documents or Electronically Stored Information*. Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:

(i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;

(ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and

(iii) A party need not produce the same electronically stored information in more than one form.

****

<Return to Article>

Appendix A - Amendments

Redline Changes to Federal Rule of Civil Procedures

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

(a) Motion for an Order Compelling Disclosure or Discovery.

(1) ***In General***. On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.

(2) ***Appropriate Court***. A motion for an order to a party must be made in the court where the action is pending. A motion for an order to a nonparty must be made in the court where the discovery is or will be taken.

(3) ***Specific Motions***.

(A) *To Compel Disclosure*. If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions.

(B) *To Compel a Discovery Response*. A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:

(i) a deponent fails to answer a question asked under Rule 30 or 31;

(ii) a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a)(4);

(iii) a party fails to answer an interrogatory submitted under Rule 33; or

(iv) a party fails to produce documents or fails to respond that inspection will be permitted—or fails to permit inspection—as requested under Rule 34.

(C) *Related to a Deposition.* When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order.

(4) ***Evasive or Incomplete Disclosure, Answer, or Response***. For purposes of this subdivision (a), an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.

(5) ***Payment of Expenses; Protective Orders***.

****

(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 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.

Appendix A - Amendments

Redline Changes to Federal Rule of Civil Procedures
****   **<Return to Article>**
Rule 55. Default; Default Judgment   ****   **(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).   ****   **<Return to Article>**
Rule 84. Forms   **[Abrogated (Apr. __, 2015, eff. Dec. 1, 2015).]**   ~~The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.~~   **<Return to Article>**
APPENDIX OF FORMS   **[Abrogated (Apr. __, 2015, eff. Dec. 1, 2015).]**   **<Return to Article>**