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Update of Federal Courts and Federal Rules of Civil Procedure

Written by
Lonny Hoffman

UPDATE OF FEDERAL COURTS AND FEDERAL RULES OF CIVIL PROCEDURE

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CHAPTER 1

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I. INTRODUCTION

In April 2014, the Judicial Conference Advisory Committee on Civil Rules recommended proposed revisions to Rules 1, 4, 16, 26, 30, 31, 33, 34, and 37 of the Federal Rules of Civil Procedure. The Committee on Rules of Practice and Procedure then approved these recommendations in May 2014. The proposed amendments will now become effective if they are approved by the Judicial Conference and the Supreme Court, and if Congress does not act to defer, modify, or reject them. Provided these conditions are met, the amendments will become effective on December 1, 2015. It is important to note that these proposed rules have not been adopted at the time of this writing (June 2014) and are accordingly subject to modification.

Since their publication in August 2013, the proposed amendments have been the subject of considerable public debate. The proposals were examined at three capacity-filled public hearings in November (Washington, D.C.), January (Phoenix), and February (Dallas), where a total of more than 120 witnesses provided testimony. During a six-month public comment period concluding in February 2014, over 2300 comments were submitted to the Advisory Committee. Of particular controversy during the public comment period were proposed amendments placing numerical limits on some forms of discovery and new standards for discovery sanctions. After the public comment period, the Advisory Committee withdrew the proposed discovery limitations and substantially revised the proposed discovery sanctions rule. Otherwise, the Advisory Committee recommended adoption of the remaining proposals, with only minor changes.

II. PROPOSED RULE CHANGES

Below are summaries of the proposed rule changes currently under consideration. The summary is followed by two sets of public comments that were submitted as part of the public debate. They are included to illustrate the arguments being made in favor and against the proposed rule changes. The first, submitted by a group of law professors including Professor Lonny Hoffman of the University of Houston Law Center, argues against the proposed rule changes. The second, submitted by Brad Berenson, Vice President and Sr. Counsel for Litigation and Legal Policy on behalf of the General Electric Company, argues in favor of the proposed rule changes.

A. Rule 1 (Scope and Purpose).

Under the proposed amendments, new language would be added to Rule 1 providing that the rules should be "employed by the court and the parties" to secure the just, speedy, and inexpensive determination of every action and proceeding. The accompanying Committee Note explains that the purpose of the amendment is to emphasize that the parties share with the court the responsibility to "construe and administer these rules to secure the just, speedy, and inexpensive determination of every action."

B. Rule 4 (Summons).

The proposed amendment would reduce the time for the service of a complaint and summons after the filing of the complaint from 120 days to 60 days.

C. Rule 16(b) (Scheduling Orders).

Under the proposed amendments, the issuance of scheduling orders would be modified in several respects.

To begin with, the provision of Rule 16(b)(1)(B) allowing for consulting at a scheduling conference by "telephone, mail, or other means" would be eliminated. According to the Committee Note, a scheduling conference is more effective if conducted through "simultaneous communication," which may include "in person, by telephone, or by more sophisticated electronic means."

Second, the timing of the scheduling conference, which is governed by Rule 16(b)(2), would be conducted within the earlier of 90 days after any defendant has been served with the complaint or 60 days after any defendant has appeared. Currently, a scheduling conference is held within the longer timeframe of 120 days of service of the complaint or 90 days after the appearance of a defendant. Under the proposed amendment, a scheduling conference may be delayed for good cause.

Finally, proposed amendments to Rule 16(b)(3)(B) would modify the "permitted contents" of a scheduling order in the following three respects: (1) allow the order to address the "preservation" of electronically stored information, in addition to existing provisions for "disclosure" and "discovery"; (2) specify that agreements reached under Federal Rules of Evidence 502 related to privileges are among those agreements that the scheduling order may include; and (3) add new sub-part (b)(3)(v) whereby the court may direct that a movant is required to request a conference with the court before filing a discovery motion.

D. **Rule 26 (General Provisions Governing Discovery).**

The proposed amendments to Rule 26 embody a number of changes to the conduct of both discovery and case management.

Perhaps most noteworthy are those changes intended to limit the scope of discovery by, among other means, emphasizing the requirement that discovery must be "proportional" to the case. To that end, Rule 26(b)(1) would be amended to require that discovery must be "proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, 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." This language is taken from existing Rule 26(b)(2)(C)(iii) which imposes on the court the duty to limit discovery where the burden or expense of proposed discovery outweighs "its likely benefit." As amended, Rule 26(b)(2)(C)(iii) would cross-reference the "proportionality" standard set forth in Rule 26(b)(1). The intent behind transferring this language, according to the Committee Note, is to "restore the proportionately factors to their original place in defining the scope of discovery."

Under the proposed amendments, the scope of permissible discovery would further be limited by deleting a sentence from Rule 26(b)(1) which authorizes the court to order discovery, where good cause is shown, of any matter "relevant to the subject matter involved in the action." Instead, according to the Committee Note, the scope of discovery should be governed by the requirement found elsewhere in current Rule 26(b)(1) that discovery must be "relevant to any party's claim or defense."

Proposed amendments to Rule 26(b)(1) would also eliminate the "reasonably calculated" standard in the current version of the rule which provides that "relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." In its place, the revised rule would provide: "Information within this scope of discovery need not be admissible in evidence to be discoverable." This proposed change also may have the effect of limiting the scope of permissible discovery. The Committee Note states that the phrase "reasonably calculated" has been used "incorrectly" to define the scope of discovery. Nevertheless under the new proposed language, discovery of inadmissible evidence remains available "so long as it is otherwise within the scope of discovery."

Other proposed amendments to Rule 26 would allow earlier service of requests for production and modify certain provisions of discovery plans and protective orders.

New section 26(d)(2) would permit "early Rule 34 requests." Under the proposed new rule, a party may serve a Rule 34 request after the expiration of 21 days from the time the summons and complaint are served on a party even though the parties have not yet had a required Rule 26(f) conference. The receiving party must respond within 30 days, measured from the time of the first conference. Under current practice, parties may not serve discovery until after the conference is conducted, subject to certain limited circumstances.

Amendments to Rule 26(f)(3) would require the parties' discovery plans to state views and proposals on two additional matters. Under sub-part (C), the parties would be required to address issues about the preservation of electronically store information, in addition to currently-required issues related to disclosure and discovery. Pursuant to sup-part (D), the parties would be required to state views and proposals on whether any agreement related to privileges should be included in an order under Federal Rule of Evidence 502.

Finally, a proposed amendment to Rule 26(c)(1)(B) would expressly allow the inclusion in protective orders of a term allocating discovery expenses among the parties.

E. Rules 30 (Oral Depositions).

Pursuant to proposed amendments to Rule 30(a)(2) and Rule 30(d)(1), where a party must seek leave to take a deposition or seeks leave for additional time to conduct a deposition, the court must grant the requested relief to the extent consistent with the proportionality requirement in Rule 26(b)(1). Initially, there were proposed amendments that would have reduced the presumptive limits on the number of depositions from ten to five for both oral and written depositions. These changes were eliminated, however, from the package of proposed amendments forwarded to the Standing Committee and were not transmitted to the Judicial Conference. The proposed amendment reducing the presumptive limit on an oral examination from one day of seven hours to six hours also has been eliminated.

F. Rule 33 (Interrogatories).

Pursuant to a proposed amendment to Rule 33(a)(1), where a party seeks to serve additional

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