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Discovery Update: 2015 Amendments to the Federal Rules of Civil Procedure

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2015 Amendments to the Federal Rules of Civil Procedure: Practical Implications and What Litigators Need to Know

On December 1, 2015, the most recent amendments to the Federal Rules of Civil Procedure went into effect. These Amendments are now applicable to all cases filed thereafter, as well any cases then pending “insofar as just and applicable.”

Rule 1 of the Federal Rules begins with the overarching goal “to secure the just, speedy, and inexpensive determination of every action and proceeding.” Fed. R. Civ. P. 1. To achieve the aspirations of Rule 1, the 2015 Amendments address early case management and the overall scope of discovery. The Amendments also, for the first time, directly address the preservation of evidence, aiming to resolve jurisdictional differences and standardize practices, specifically sanctions for spoliation of electronically stored information (“ESI”). This paper provides an overview of the key 2015 Amendments and discusses the practical implications of these amended rules on early case management, discovery, and litigation strategy.

I. Early Case Management: Amendments to Rules 1, 4(m), 16(b), and 26(f).

The following Amendments are designed to expedite the initial stages of litigation, and will require litigants to gear up more quickly once a complaint is filed and served.

A. Rule 1

Rule 1 emphasizes that the parties have an obligation to make litigation efficient. Specifically, Rule 1 provides that the Federal Rules “should be construed, administered, *and employed by the court and the parties* to secure the just, speedy, and inexpensive determination of every action and proceeding.” Fed. R. Civ. P. 1 (amended language italicized) (emphasis added). As the Advisory Committee’s Note to Rule 1 explains:

Rule 1 is amended to emphasize that just as the court should construe and administer these rules to secure the just, speedy, and inexpensive determination of every action, so the parties share the responsibility to employ the rules in the same way. . . . [D]iscussions of ways to improve the administration of civil justice regularly include pleas to discourage over-use, misuse, and abuse of procedural tools that increase cost and result in delay. Effective advocacy is consistent with—and indeed depends upon—cooperative and proportional use of procedure.

The new language in Rule 1 requires *all parties* involved in litigation to cooperate and encourage parties to refrain from misusing discovery tools that increase cost and delay the proceedings.

B. Rules 4(m) and 16(b)

Rule 4(m) has been revised to reduce the time to serve a defendant with the summons and complaint from 120 to 90 days. Similarly, Rule 16(b)’s amendment reduces the time to enter scheduling orders to the earlier of 90 days (previously 120 days) after a defendant has been served or 60 days (previously 90 days) after a defendant has made an appearance. Rule 16(b) was also

amended to permit scheduling orders to address the preservation of ESI and incorporate the parties' agreements for asserting claims of privilege and work-product protection.

C. Rule 26(f)

Under the prior Rules, a de facto "discovery hold" applied in most cases until the parties' initial case management conference—called a Rule 26(f) conference—which often did not occur until many months after a complaint was filed. Rule 26 has now been amended (via Rule 26(d)) to allow Rule 34 document requests to be served before the parties hold a Rule 26(f) conference. Specifically, Rule 34 document requests may be served to the opposing party "more than 21 days" after the summons and complaint are served. However, revised Rule 34 clarifies that a response to a request for production served before the first Rule 26(f) conference is not due until 30 days after the first Rule 26(f) conference.

The amendment is intended to make the parties' Rule 26(f) conference more productive. In theory, if the parties know what documents will be requested earlier, they can discuss agreements to facilitate document searches and production, thereby streamlining discovery.

II. Proportionality and the Scope of Discovery.

As part of the 2015 Amendments, Rule 26(b)(1) was revised to promote "proportional" discovery by incorporating proportionality factors, previously located in Rule 26(b)(2)(C), into the text of Rule 26(b)(1). The factors have been slightly revised and a new factor has been added. The relevant changes to Rule 26(b) are redlined below:

(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 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).~~

(2) Limitations on Frequency and Extent.

(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:

(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~~

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