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Federal Rules Update

Hon. Xavier Rodriguez

**Federal Rules Update
Judge Xavier Rodriguez**

I. Introduction

This paper summarizes key issues addressed by the various federal courts since the December 1, 2015 and 2016 amendments to the Federal Rules of Civil Procedure.

II. Rule 1 - Cooperation

[These rules] 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.

A number of courts have mentioned Rule 1 in a variety of settings. In the Fifth Circuit, the court in *Century Sur. Co. v. Nafel*, No. 314CV00101JWDEWD, 2016 WL 4059678 (M.D. La. July 28, 2016) applied Rule 1 in the context of deciding a Rule 37(b)(2) sanctions motion. In denying default judgment sanctions, the court noted that “a court's chosen sanctions must be just pursuant to Rules 1 and 37(b)(2).” *Id.* at *10. Likewise, the court in *Rivera v. Martin J. Donnelly Antique Tools*, No. 314CV00667JWDEWD, 2016 WL 1389984 (M.D. La. Apr. 7, 2016) applied Rule 1 in the context of a Rule 37(b)(2) sanctions motion. “The Rules demand compliance with their every stricture, the discovery system formed so as to encourage a cooperative and productive exchange between naturally adverse persons. When these obligations are flouted, and when noncompliance reflects not a momentary stumble but a pattern, Rule 37 commands that sanctions be imposed. Although dismissal may be the most extreme, this Rule's ends can here be fulfilled by a lesser punishment. In particular, by striking the Plaintiff's Supplemental Response and by ordering the payment of attorneys' fees, his failure will be suitably addressed.” *Id.* at 7.

In *Olesczuk v. Citizens One Home Loans*, 2016 U.S. Dist. Lexis 153342 (D. Nev. Nov. 4, 2016), the court observed that magistrate judges are “not the Maytag repairman of federal judges desperately hoping for something to do.” Citing Rule 1, the court noted that the majority of cases should be resolved through the meet and confer process and common sense cooperation without any court involvement.

III. Case Management

a. Rule 4(m) Summons (2015 and 2016 amendments)

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), 4(h)(2), or 4(j)(1) ~~or to service of a notice under Rule 71.1(d)(3)(A).~~

b. Rule 6(d): Computing and Extending Time (2016 Amendment)

When a party may or must act within a specified time after service and service is made under Rule 5(b)(2)(C) (mail), (D) (leaving with clerk), ~~(E)~~, or (F) (other means consented to), 3 days are added after the period would otherwise expire under Rule 6(a).

Committee Note

Rule 6(d) is amended to remove service by electronic means ... from the modes of service that allow 3 added days to act after being served.

c. Rule 16 Pretrial Conferences; Scheduling; Management

(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 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.

IV. Federal Rule of Civil Procedure 37(e)

Rule 37(e) provides:

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:

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