



Proposed Civil Rules Amendments

Shook,
Hardy &
Bacon^{L.L.P.}

RULEMAKING PROCESS

- Amendments adopted April 10-11, 2014 by the Advisory Committee on Civil Rules and approved by the Standing Committee on Rules on May 29-30, 2014.
- The proposed amendments were approved by the Judicial Conference of the United States in September 2014, and the Supreme Court in April 2015. They are now before the Congress.
- If no changes are made, the proposed amendments go into effect December 1, 2015.



DUKE CONFERENCE PROPOSALS



CASE MANAGEMENT

Rule 4(m) Service of Summons

(m) TIME LIMIT FOR SERVICE. If a defendant is not served within ~~120~~ 90 days after the complaint is filed, the court *** must dismiss the action without prejudice against that defendant or order that service be made within a specified time. *** This subdivision does not apply *** to service of a notice under Rule 71.1(d)(3)(A).

Rule 16(b)(2) Scheduling Order

(1) *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.

Rule 16(b)(1) Scheduling Order

- (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.~~

Rule 16(b)(3) Contents of Order

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

- (iii) provide for disclosure, ~~or~~ discovery, or preservation of electronically stored information;
- (iv) include any agreements the parties reach for asserting claim 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;

[Present (v) and (vi) to be renumbered]

Rule 26(f)(3) Discovery Conference

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

Rule 26(c)(1)(B) Protective Orders

(1) *In General.* *** The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or example, including one or more of the following: ***

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

Advisory Committee Note: “Recognizing the authority (to allocate expenses) does not imply that cost-shifting should become a common practice. Courts and parties should continue to assume that a responding party ordinarily bears the costs of responding.”

Rule 26(d)(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.

Rule 34(b)(2)(A) Time to Respond to Early Rule 34 Requests

(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.

Rule 26(d)(3) Sequence of Discovery

- (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.



PROPORTIONALITY

Rule 26(b)(1) Scope of Discovery

(1) Unless otherwise limited by court order...: 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.

Rule 26(b)(1) Scope of Discovery

Deleted from Rule 26(b)(1):

— 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).

Rule 26(b)(2)(C) Limitations

(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 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 matter.

Rule 30(a)(2)(A)(i) Depositions

(a) WHEN A DEPOSITION MAY BE TAKEN. ***

(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:

(i) the deposition would result in more than 10 depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants

No change made to number of depositions

Rule 30(d)(1) Duration

(d) DURATION***

(1) *Duration*. Unless otherwise stipulated or ordered by the court, a deposition is limited to one 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.

No change made to duration of a deposition

Rule 31(a)(2)(A)(i)

Depositions by Written Questions

(a) WHEN A DEPOSITION MAY BE TAKEN. ***

(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): ***

Rule 33(a)(1) Interrogatories

(a) IN GENERAL.

- (1) *Number.* Unless stipulated or ordered by the court, a party may serve on another party no more than 25 interrogatories, including all discrete subparts. Leave to serve additional interrogatories may be granted to the extent consistent with Rule 26(b)(1) and (2).

- (2) *No change made to number of interrogatories*

Rule 36 (Requests for Admission)

No limitation imposed on numbers of requests for admission

Rule 34(b)(2)(C) Requests for Documents, ESI

(C) *Objections.* An objection must state whether any responsive materials are being withheld on the basis of that objection. ***

Rule 34(b)(2)(B)

Requests for Documents, ESI

(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.

Rule 37(a)(3)(B)(iv) Motions to Compel

(B) *** The motion may be made if: ***

(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.



COOPERATION

Rule 1 Scope and Purpose

[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.



**REPLACEMENT OF FEDERAL
RULE OF CIVIL PROCEDURE
37(e)**

Rule 37(e) Failure to Preserve

(e) Failure to 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 any 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:

Rule 37(e) Failure to Preserve

(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.



ABROGATION OF FEDERAL RULE OF CIVIL PROCEDURE

84

Rule 84 (Official Forms)

- Rule 84 will be abrogated.
- Present Forms 5 (Notice of a Lawsuit and Request to Waiver Service of a Summons) and 6 (Waiver of the Service of Summons) will become incorporated into Rule 4(d).
- Forms are available at the website of the Administrative Office of the United States Courts:

<http://www.uscourts.gov/FormsAndFees/Forms/CourtForms.aspx>



Questions?

Shook,
Hardy &
Bacon^{L.L.P.}