Are You Ready for the Changes to the Federal Rules of Civil Procedure That Took Effect on December 1, 2015?

The amendments to the Federal Rules of Civil Procedure ("Rules") that took effect on December 1, 2015 are the most sweeping changes to the federal civil rules in years. Attorneys must adjust to a significant change in the basic discovery standard and adapt to changes in procedure for discovery matters, sanctions, service of process, default judgments, and court forms. The amendments apply to cases filed after December 1, 2015, as well as pending cases "insofar as just and practicable." Following is a summary of the changes and some thoughts on how they might affect day to day practice.

Improved Scheduling and Cooperation and Reduced Delay

- The amendment to Rule 1 makes it clear that the parties themselves have an obligation to make litigation efficient, not just the Court. It now states that the 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." The Committee Notes indicated that to adhere to Rule 1 and decrease litigation costs, parties should reduce "hyperadversary behavior."

- The amendment to Rule 4(m) reduces the presumptive time to serve a defendant from 120 to 90 days.

> PRACTICE TIP: Attorneys should be sure that staff responsible for docketing deadlines are aware of the change to the time for service of federal defendants and that, if docketing software is used, that it has been updated to reflect this change.

- The amendment to Rule 16(b)(2) reduces the time to issue a scheduling order to the earlier of 90 days (down from 120 days) after any defendant has been served, or 60 days (down from 90 days) after any defendant has appeared, unless the judge finds good cause for delay.

> PRACTICE TIP: The reduced time for entry of a scheduling order and discovery conference means that attorneys need to plan ahead, anticipate delays and disputes, and consider what deadlines will be practical in light of any constraints, such as client preferences or the location, format, and accessibility of documents to be preserved.

- The amendment to Rule 16(b)(3) permits the scheduling order to require a conference with the court before a party may move for a discovery order. The Committee Notes to Rule 16(b)(1) encourage that courts hold a scheduling conference that involves "direct simultaneous communication" between parties and that "may be held in person, by telephone, or by more sophisticated electronic means."

- The amendment to Rule 16(b)(3) allows the scheduling order to provide for preservation of ESI and for any agreements the parties reached under Federal Rule of Evidence 502, which governs attorney-client privilege and work product.

- The amendment to Rule 26(f)(3) requires the parties' initial discovery plan to state the parties' views and proposals on issues about preservation of ESI and include court orders under FRE 502.

> PRACTICE TIP: Think about the scope of protection that you will need for inadvertently produced privileged information, which can impact the cost-benefit analysis with respect to subsequent document discovery options.

- Newly formulated Rule 26(d)(2), allows parties to begin serving requests for production of documents before the parties hold their Rule 26(f) conference. However, a party must still wait 21 days after the receiving party was served with summons and the complaint to serve these requests. The 30-day time period for responding to these requests, however, would not start until after the Rule 26(f) conference (i.e., the requests are deemed served at the time of the conference).

Adopted "Proportionality" Standard for Discovery and Eliminated "Reasonably Calculated" Standard

- The amendment to Rule 26 eliminates language that every attorney has known and recited since civil procedure class – that discovery should be "reasonably calculated to lead to the discovery of admissible evidence." Instead, information is discoverable under revised Rule 26(b)(1) if it is relevant to a party's claim or defense and proportional to the needs of the case. Thus, the definition no longer includes language authorizing the court to "order discovery of any matter relevant to the subject matter involved in the action" or to grant discovery "reasonably calculated to lead to the discovery of admissible evidence."

> PRACTICE TIP: Immediately replace and revise any forms you have related to federal court discovery which use the "reasonably calculated" nomenclature.

- The amendment to Rule 26(b)(1) now makes proportionality considerations part of the definition of the scope of discovery and reinforces parties' obligations to consider proportionality in making discovery requests, responses, and objections. It does so by moving the proportionality factors previously found under Rule 26(b)(2)(C) into Rule 26(b)(1), and adding as a factor "the parties' relative access to relevant information."

> PRACTICE TIP: Given the proportionality limitations, parties should consider whether the manner in which they describe claims and affirmative defenses may unnecessarily or unintentionally expand the scope of discovery. For example, in order to avoid a risk of waiving an affirmative defense, some defendants assert a litany of affirmative defenses

without specifically investigating whether such defenses reasonably may apply to the facts alleged in the complaint. Those “laundry list” defenses can unintentionally expand the scope of discovery since Rule 26(b(1) allows a party to obtain discovery relevant to any defense and Rule 26(a)(1)(A)(i) and (ii) also require a party to automatically disclose the name of each person likely to have discoverable information or ESI that the disclosing party may use to support each defense on that “laundry list.”

- The amendment to Rule 26(c)(1)(B) authorizes courts to issue cost-shifting orders, determining the "allocation of expenses" for certain discovery.

PRACTICE TIP: Parties should draft discovery requests with the proportionality limitations in mind and consider the costs associated with responding to the requests.

Eliminated Boilerplate Objections to Discovery Requests and Specified Production in Response

- The amendment to Rule 34(b)(2) requires parties responding to requests for production to (i) be more specific in objections; (ii) state whether documents actually will be withheld pursuant to each objection; (iii) state whether they will produce copies or permit inspection; and (iv) complete production "no later than the time for inspection specified in the request or another reasonable time specified in the response."

PRACTICE TIP: Instead of asserting that a request is "unduly burdensome," parties now need to specify how it is burdensome or what that burden means to the scope of production. For example, a party could object that a request is unduly burdensome because it calls for discovery from an unnecessarily broad range of custodians, and could assert that documents will be withheld from custodians and sources that are not identified by the responding party (or agreed upon in subsequent negotiations). Similarly, rather than asserting that a request is "vague" in specific or general objections, the responding party will need to explain why it is vague. For example, a party could object that a request for "documents about costs" is vague because it may be read to include categories of documents which have no relevance to the claims and defenses in the matter and/or do not warrant the associated expense. The party could assert that, as a result, it will only produce documents that relate to the cost of materials.

- The amendment to Rule 37(a)(3)(B)(iv) permits a party to move for an order compelling production if another party fails to produce documents.

Adopted Uniform Spoliation Sanction Standard for E-Discovery

- The amendment to Rule 37(e) creates a uniform standard for spoliation sanctions and curative measures where ESI "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." If another party is prejudiced by the loss of the ESI, a court "may order measures no greater than necessary to cure the prejudice." Rule 37(e)(1). Where the party acted with intent to deprive another party of the ESI, a court 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." Rule 37(e)(2). The Committee notes "this rule recognizes that 'reasonable steps' to preserve suffice; it does not call for perfection."

> PRACTICE TIP: Law firms should examine their own existing records management policies, assess where data is being stored and how long it is being retained. A proportionate and well-documented information governance protocol with specific records retention and records disposition guidelines that is consistently applied will help thwart a spoliation allegation in the event the firm is ever sued for malpractice.

Clarified Authority to Set Aside Default Judgments and Eliminated Appendix of Forms

- The amendment to Rule 55(c) was amended to add the word “final” before “judgment.” The change to Rule 55 is meant to clarify that a default judgment that does not dispose of all of the claims among all parties is not a final judgment, unless so directed by the court, and thus may be revised by the court until final judgment is entered.

- Rule 84 has been abrogated in its entirety. This rule had stated that "the forms in the Appendix suffice under these rules."

> PRACTICE TIP: To the extent that your practice uses any of the forms previously contained in the Appendix of Forms, you must re-evaluate whether those forms are sufficient to meet current substantive and procedural requirements. For example, the abrogation of Rule 84 may allow courts to find that bare-bones patent complaints under Form 18 are insufficient, and require that direct infringement allegations comply with the Supreme Court's precedent regarding pleading standards.

CONCLUSION

The amended Federal Rules of Civil Procedure alter the discovery landscape in federal court and change some of the fundamental elements of arguing discovery issues and drafting requests for production and responses to those requests. Lawyers who have cases pending in federal court should review the amendments and advisory notes in their entirety. A complete copy of the amendments and advisory notes case be found here: http://www.supremecourt.gov/orders/courtorders/frcv15(update)_1823.pdf.

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